

12-1-2010

Tarbet v. J.R. Simplot Co. Agency's Record Dckt. 38096

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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

DAVID TARBET,

Claimant/Respondent,

v.

J. R. SIMPLOT, Self-Insured Employer,

Defendant/Appellant.

and

STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND,

Defendant/Respondent.

LAW CLERK

SUPREME COURT NO. 38096

AGENCY RECORD

Attorney for Defendant/Appellant:

Wes L. Scrivner
PO Box 27
Boise, ID 83707

Associate of Counsel for
Defendant/Appellant:

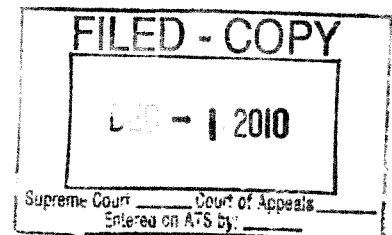
Daniel A. Miller
401 W. Front St. Ste. 401
Boise, ID 83702

Attorney for Claimant/Respondent:

Fred J. Lewis
PO Box 1391
Pocatello, ID 83204-1391

Attorney for ISIF:

Paul J. Augustine
PO Box 1521
Boise, ID 83701



COPY

38096

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LIST OF EXHIBITS

Reporter's Transcript taken 12/10/09 shall be filed with the Supreme Court.

Transcript of oral argument in lieu of briefs, taken 2/5/10, shall be filed with the Supreme Court.

Claimant's Exhibits:

- A. Job Applications
- B. Bill Jordan's Report
- C. Tax Returns

Employer's Exhibits:

- 1. Dr. Blair's Records
- 2. Dr. Walker's Records
- 3. Dr. McGee's Records
- 4. Dr. Huneycutt's Records
- 5. Dr. Robert's Records
- 6. Nancy Collins' Records
- 7. Bear Lake Memorial Records
- 8. Dr. Campbell's Records
- 9. Pocatello Radiology Records
- 10. Portneuf Medical Records
- 11. Dr. Himmeler's Records
- 12. Dr. Paine's Records
- 13. Idaho Orthopaedic Sports Clinic Records
- 14. Dr. Bules' Records
- 15. Bannock Regional Medical Center Records
- 16. Dr. Amiel's Records
- 17. Dr. McDevitt's Records
- 18. Dr. Thomas' Records
- 19. Transcript of David Tarbet, taken 1/25/08

20. Transcript of David Tarbet, taken 10/7/09
21. Job Descriptions
22. Photographs for illustrative purposes

ISIF'S Exhibits:

1. Bannock Regional Medical Center Records
2. Bear Lake Memorial Records
3. Dr. Bomsta's Records
4. Dr. Bules' Records
5. Dr. Campbell Records
6. Caribou Memorial Records
7. Dr. Himmler's Records
8. Dr. Huneycutt's Records
9. Idaho Orthopaedic & Sports Clinic Records
10. Lakeview Medical Clinic Records
11. Dr. McGee's Records
12. Dr. Paine's Records
13. Physician's Immediate Care Records
14. Pocatello Orthopaedic & Sports Medicine Records
15. Dr. Stephens' Records
16. Dr. Thomas' Records
17. Portneuf Medical Center Records
18. Dr. Roberts' Records
19. Rocky Mountain Surgery Center Records
20. Summit Orthopaedics Records
21. Teton Open MRI of Pocatello Records
22. Dr. Thomas Records
23. Salt Lake Veterans Administration Medical Records
24. Walker Spine and Sports Records
25. Industrial Commission Records

26. Industrial Commission Rehabilitation Division Records
27. Social Security Administration Records
28. Jordan Employability Report
29. Collins Vocational Assessment
30. David Tarbet Deposition taken 10/7/09
31. David Tarbet Deposition taken 11/13/01
32. J.R. Simplot Personnel Records
33. Claimant Applications for Employment

Additional Documents:

1. Deposition transcript of David Tarbet, taken 10/7/09
2. Deposition transcript of David Tarbet, taken 1/25/08
3. Deposition transcript of Nancy Collins, taken 1/5/10
4. Deposition transcript of William C. Jordan, taken 1/5/10
5. Deposition transcript of Gary C. Walker, M.D., taken 1/7/10

**WORKERS' COMPENSATION
COMPLAINT****ORIGINAL**

CLAIMANT'S (INJURED WORKER) NAME AND ADDRESS David Tarbet 380 South First East, Apt S Soda Springs, ID 83276		CLAIMANT'S ATTORNEY'S NAME, ADDRESS, AND TELEPHONE NUMBER Fred J. Lewis Racine, Olson, Nye, Budge & Bailey, Chartered 201 E. Center - Center Street Plaza P. O. Box 1391 Pocatello, ID 83204-1391	
TELEPHONE NUMBER: 208-547-2465			
EMPLOYER'S NAME AND ADDRESS (at time of injury) J.R. Simplot Company c/o Wes Scrivner P.O. Box 27 Boise, ID 83707-0027		WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Self-Insured	
CLAIMANT'S SOCIAL SECURITY NO. [REDACTED]	CLAIMANT'S BIRTHDATE [REDACTED]	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE April 5, 2007	
STATE AND COUNTY IN WHICH INJURY OCCURRED Caribou County, State of Idaho		WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE OF: \$1,168.00 , PURSUANT TO IDAHO CODE § 72-419	
DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED) Claimant steam cleaning pumps at Conda Station and wand kicked back and injured Claimant.			
NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE Injured neck, shoulders, arms and hands.			
WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME? Medical Benefits, TTD benefits, PPI benefits, PPD benefits, and Total and Permanent Disability benefits.			
DATE OF WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER April 5, 2007		TO WHOM NOTICE WAS GIVEN Bill Horsley	
HOW NOTICE WAS GIVEN: <input checked="" type="checkbox"/> ORAL <input checked="" type="checkbox"/> WRITTEN <input type="checkbox"/> OTHER, PLEASE SPECIFY			
ISSUE OR ISSUES INVOLVED Entitlement to Medical benefits Entitlement to TTD benefits Entitlement to PPI benefits Entitlement to PPD benefits Entitlement to Total and Permanent Disability benefits			
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO IS SO, PLEASE STATE WHY			

**NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND MUST BE IN ACCORDANCE WITH
IDAHO CODE § 72-334 AND FILED ON FORM I.C. 1002**

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)

Dr. Campbell, Montana

Dr. Mary Himmler, Pocatello, Idaho

Dr. Benjamin Blair, Pocatello, Idaho

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE? Unknown

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY? \$Unknown

WHAT MEDICAL COSTS HAVE YOU PAID, IF ANY? \$Unknown

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE.

☒ YES☐ NO

DATE

11/13/07

SIGNATURE OF CLAIMANT OR ATTORNEY

PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITSNAME AND SOCIAL SECURITY NUMBER OF
PARTY FILING COMPLAINT

DATE OF DEATH

RELATION TO DECEASED CLAIMANT

WAS FILING PARTY DEPENDENT ON DECEASED?

☐ YES☐ NO

DID FILING PARTY LIVE WITH DECEASED AT TIME OF ACCIDENT?

☐ YES☐ NO**CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM****CERTIFICATE OF SERVICE**hereby certify that on the 13 day of November, 2007, I caused to be served a true and correct copy of the foregoing Complaint on:

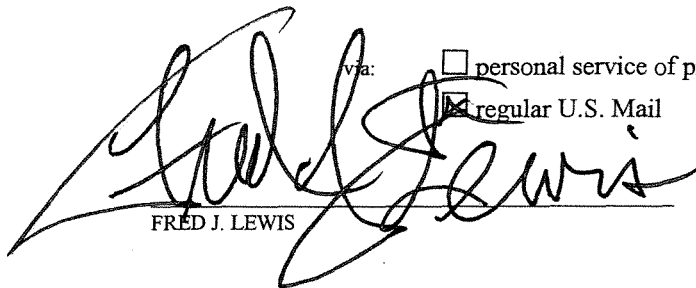
EMPLOYER'S NAME AND ADDRESS

J.R. Simplot Company
c/o Wes Scrivner
P.O. Box 27
Boise, ID 83707-0027

SURETY'S NAME AND ADDRESS

Pinnacle Risk Management Services
960 Broadway Ave, Ste 160
Boise, ID 83706-3670a: ☐ personal service of process

X Certified U.S. Mail

via: ☐ personal service of process☒ regular U.S. Mail
FRED J. LEWIS**NOTICE: An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. If no answer is filed, Default Award may be entered!**

Further information may be obtained from: Industrial Commission, Judicial Division, P.O. Box 83720, Boise, Idaho 83720-0041 (208) 334-6000.

2

INDUSTRIAL COMMISSION
P.O. BOX 83720
MOISE, ID 83720-0041

Patient Name: David Tarbet
Birth Date: [REDACTED]
Address: 380 South 1st East, Apt S, Soda Springs, Id 83276
Phone Number: (208) 547-2465
SSN or Case Number: [REDACTED]

(Provider Use Only)

Medical Record Number: _____

☐ Pick up Copies ☐ Fax Copies # _____

☐ Mail Copies

ID Confirmed by: _____

AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION

I hereby authorize _____ to disclose health information as specified:

Provider Name - must be specific for each provider

as _____
Insurance Company/Third Party Administrator/ Self Insured Employer/ISIF, their attorneys or patient's attorney

Street Address

City

State

Zip Code

Purpose of need for data: _____

(e.g. Worker's Compensation Claim)

Information to be disclosed:


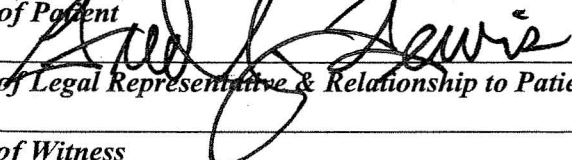
Date(s) of Hospitalization/Care: _____

- ☐ Discharge Summary
- ☐ History & Physical Exam
- ☐ Consultation Reports
- ☐ Operative Reports
- ☐ Lab
- ☐ Pathology
- ☐ Radiology Reports
- ☐ Entire Record
- ☐ Other: Specify _____

I understand that the disclosure may include information relating to (check if applicable):

- ☐ AIDS or HIV
- ☐ Psychiatric or Mental Health Information
- ☐ Drug /Alcohol Abuse Information

I understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. **Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim.** Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.

Signature of Patient: 
Signature of Legal Representative & Relationship to Patient/Authority to Act: 
Signature of Witness: _____

11-13-07
Date
11/13/07
Date

WORKERS' COMPENSATION COMPLAINT

ORIGINAL

CLAIMANT'S (INJURED WORKER) NAME AND ADDRESS David Tarbet 380 South First East, Apt S Soda Springs, ID 83276		CLAIMANT'S ATTORNEY'S NAME, ADDRESS, AND TELEPHONE NUMBER Fred J. Lewis Racine, Olson, Nye, Budge & Bailey, Chartered 201 E. Center - Center Street Plaza P. O. Box 1391 Pocatello, ID 83204-1391	
TELEPHONE NUMBER: 208-547-2465			
EMPLOYER'S NAME AND ADDRESS (at time of injury) J.R. Simplot Company c/o Wes Scrivner P.O. Box 27 Boise, ID 83707-0027		WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Self-Insured	
CLAIMANT'S SOCIAL SECURITY NO. [REDACTED]	CLAIMANT'S BIRTHDATE [REDACTED]	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE May 13, 2007	
STATE AND COUNTY IN WHICH INJURY OCCURRED Caribou County, State of Idaho		WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE OF: \$1,168.00 , PURSUANT TO IDAHO CODE § 72-419	
DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED) Claimant was loosening bolts on a valve. As it came loose, it jerked injured Claimant.			
NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE Injured neck, shoulders, arms, hands and back.			
WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME? Medical Benefits, TTD benefits, PPI benefits, PPD benefits, and Total and Permanent Disability benefits.			
DATE OF WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER May 13, 2007		TO WHOM NOTICE WAS GIVEN Gary Norman	
HOW NOTICE WAS GIVEN: <input checked="" type="checkbox"/> ORAL <input checked="" type="checkbox"/> WRITTEN <input type="checkbox"/> OTHER PLEASE SPECIFY			
ISSUE OR ISSUES INVOLVED Entitlement to Medical benefits Entitlement to TTD benefits Entitlement to PPI benefits Entitlement to PPD benefits Entitlement to Total and Permanent Disability benefits			
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO IS SO, PLEASE STATE WHY			

**NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND MUST BE IN ACCORDANCE WITH
IDAHO CODE § 72-334 AND FILED ON FORM I.C. 1002**

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)

Dr. Campbell, Montana

Dr. Mary Himmler, Pocatello, Idaho

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE? Unknown

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY? \$Unknown
IF ANY? \$Unknown

WHAT MEDICAL COSTS HAVE YOU PAID, IF ANY? \$Unknown

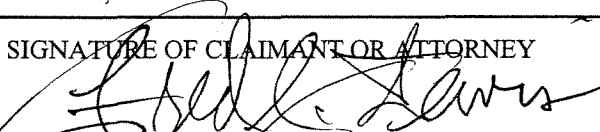
I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE.

☒ YES☐ NO

DATE

11/13/07

SIGNATURE OF CLAIMANT OR ATTORNEY

PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITSNAME AND SOCIAL SECURITY NUMBER OF
PARTY FILING COMPLAINT

DATE OF DEATH

RELATION TO DECEASED CLAIMANT

WAS FILING PARTY DEPENDENT ON DECEASED?

☐ YES☐ NO

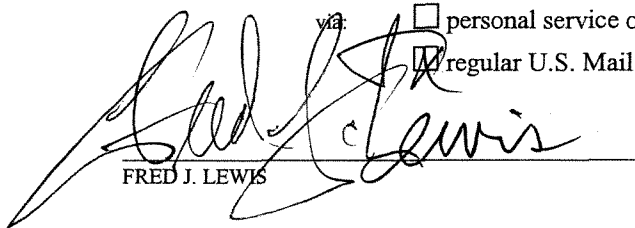
DID FILING PARTY LIVE WITH DECEASED AT TIME OF ACCIDENT?

☐ YES☐ NO**CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM****CERTIFICATE OF SERVICE**hereby certify that on the 13 day of November, 2007, I caused to be served a true and correct copy of the foregoing Complaint
pon:

EMPLOYER'S NAME AND ADDRESS

J.R. Simplot Company
c/o Wes Scrivner
P.O. Box 27
Boise, ID 83707-0027

SURETY'S NAME AND ADDRESS

Pinnacle Risk Management Services
960 Broadway Ave, Ste 160
Boise, ID 83706-3670a: ☐ personal service of process
X Certified U.S. Mailvia: ☐ personal service of process
☒ regular U.S. Mail
FRED J. LEWIS**NOTICE: An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. If no answer is filed, Default Award may be entered!**

Further information may be obtained from: Industrial Commission, Judicial Division, P.O. Box 83720, Boise, Idaho 83720-0041 (208) 334-6000.

INDUSTRIAL COMMISSION
P.O. BOX 83720
MOBILE, ID 83720-0041

Patient Name: David Tarbet
Birth Date: [REDACTED]
Address: 380 South 1st East, Apt S, Soda Springs, Id 83276
Phone Number: (208) 547-2465
SSN or Case Number: [REDACTED]

(Provider Use Only)

Medical Record Number: _____

☐ Pick up Copies ☐ Fax Copies # _____

☐ Mail Copies

ID Confirmed by: _____

AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION

I hereby authorize _____ to disclose health information as specified:

Provider Name - must be specific for each provider

as:

Insurance Company/Third Party Administrator/ Self Insured Employer/ISIF, their attorneys or patient's attorney

Street Address

City

State

Zip Code

Purpose of need for data:

(e.g. Worker's Compensation Claim)

Information to be disclosed:

Date(s) of Hospitalization/Care: _____

- ☐ Discharge Summary
- ☐ History & Physical Exam
- ☐ Consultation Reports
- ☐ Operative Reports
- ☐ Lab
- ☐ Pathology
- ☐ Radiology Reports
- ☐ Entire Record
- ☐ Other: Specify _____

I understand that the disclosure may include information relating to (check if applicable):

- ☐ AIDS or HIV
- ☐ Psychiatric or Mental Health Information
- ☐ Drug /Alcohol Abuse Information

I understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. **Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim.** Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.

Signature of Patient: *David Tarbet*

Signature of Legal Representative & Relationship to Patient/Authority to Act: *Paul J. Lewis*

Signature of Witness

Original: Medical Record Copy: Patient

Date: 11-13-07
Date: 10/13/07

Date

Complaint

6

ANSWER TO COMPLAINT

I.C. NO. 2007-012004

INJURY DATE 4/5/07

- ☒ The above-named employer or employer/surety responds to Claimant's Complaint by stating:
- ☐ The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

CLAIMANT'S NAME AND ADDRESS David Tarbet 380 South First East, Apt. S Soda Springs, ID 83276	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS Fred J. Lewis P. O. Box 1391 Pocatello, ID 83204-1391
EMPLOYER'S NAME AND ADDRESS J. R. Simplot Company P. O. Box 27 Boise, ID 83707-0027 TELEPHONE NUMBER: (208) 336-2110	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Self-insured, administered by Pinnacle Risk Management Services PO Box 6768 Boise, Idaho 83707
ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS) Wes L. Scrivner, (ISB No. 2306) P. O. Box 27 Boise, Idaho 83707	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)

RECEIVED
INDUSTRIAL COMMISSION
DEC - 4 10:23

IT IS: (Check One)	
Admitted	Denied
<input type="checkbox"/>	<input checked="" type="checkbox"/>
<input checked="" type="checkbox"/>	<input type="checkbox"/>
<input checked="" type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input checked="" type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/> N/A
<input type="checkbox"/>	<input checked="" type="checkbox"/>
<input type="checkbox"/>	<input checked="" type="checkbox"/>
<input checked="" type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>

1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
2. That the employer/employee relationship existed.
3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
4. That the condition for which benefits are claimed was caused by an accident arising out of and in the course of Claimant's employment.
5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
7. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, § 72-419: \$1218.24.
8. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

9. What benefits, if any, do you concede are due Claimant?
None.

ORIGINAL

7

(Continued from front)

10. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

No accident or injury.

Under the Commission rules, you have 21 days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule 3.D., Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE.

☐ YES

☐ NO

Unknown at this time.

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE.

No.

Amount of Compensation Paid to Date

PPI/PPD

TTD

Medical

0

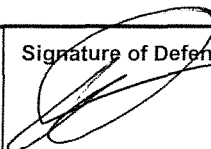
0

0

Dated

November 29, 2007

Signature of Defendant or Attorney



PLEASE COMPLETE

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November, 2007, I caused to be served a true and correct copy of the foregoing Answer upon:

CLAIMANT'S NAME AND ADDRESS

David Tarbet
c/o Fred J. Lewis
P. O. Box 1391
Pocatello, ID 83204

**EMPLOYER AND SURETY'S
NAME AND ADDRESS**

**INDUSTRIAL SPECIAL INDEMNITY FUND
(if applicable)**

via: ☐ personal service of process
☒ regular U.S. Mail

via: ☐ personal service of process
☐ regular U.S. Mail

via: ☐ personal service of process
☐ regular U.S. Mail

Signature



ANSWER TO COMPLAINT

I.C. NO. 2007-038938

INJURY DATE 5/13/07

- ☒ The above-named employer or employer/surety responds to Claimant's Complaint by stating:
- ☐ The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

CLAIMANT'S NAME AND ADDRESS David Tarbet 380 South First East, Apt. S Soda Springs, ID 83276	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS Fred J. Lewis P. O. Box 1391 Pocatello, ID 83204-1391
EMPLOYER'S NAME AND ADDRESS J. R. Simplot Company P. O. Box 27 Boise, ID 83707-0027 TELEPHONE NUMBER: (208) 336-2110	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Self-insured, administered by Pinnacle Risk Management Services PO Box 6768 Boise, Idaho 83707
ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS) Wes L. Scrivner, (ISB No. 2306) P. O. Box 27 Boise, Idaho 83707	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)

RECEIVED
INDUSTRIAL COMMISSION
DEC - 4 A 10 23

IT IS: (Check One)	
Admitted	Denied
<input type="checkbox"/>	<input checked="" type="checkbox"/>
<input checked="" type="checkbox"/>	<input type="checkbox"/>
<input checked="" type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input checked="" type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/> N/A
<input type="checkbox"/>	<input checked="" type="checkbox"/>
<input type="checkbox"/>	<input checked="" type="checkbox"/>
<input checked="" type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>

1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
2. That the employer/employee relationship existed.
3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
4. That the condition for which benefits are claimed was caused by an accident arising out of and in the course of Claimant's employment.
5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
7. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, § 72-419: \$1218.24.
8. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

9. What benefits, if any, do you concede are due Claimant?
None.

9
ORIGINAL

(Continued from front)

10. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

No accident or injury.

Under the Commission rules, you have 21 days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule 3.D., Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE.

☐ YES

☐ NO

Unknown at this time.

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE.

No.

Amount of Compensation Paid to Date

PPI/PPD

TTD

Medical

0

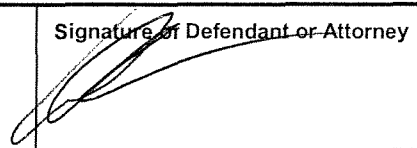
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0

Dated

November 29, 2007

Signature of Defendant or Attorney



PLEASE COMPLETE

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November, 2007, I caused to be served a true and correct copy of the foregoing Answer upon:

CLAIMANT'S NAME AND ADDRESS

David Tarbet
c/o Fred J. Lewis
P. O. Box 1391
Pocatello, ID 83204

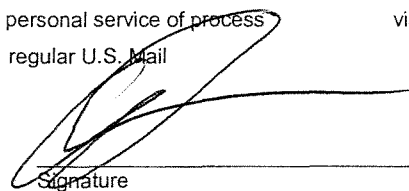
**EMPLOYER AND SURETY'S
NAME AND ADDRESS**

**INDUSTRIAL SPECIAL INDEMNITY FUND
(if applicable)**

via: ☐ personal service of process
☒ regular U.S. Mail

via: ☐ personal service of process
☐ regular U.S. Mail

via: ☐ personal service of process
☐ regular U.S. Mail


Signature

WES L. SCRIVNER
Attorney at Law
Post Office Box 27
Boise, Idaho 83707
Telephone: (208) 389-7314
Facsimile: (208)389-7464
Idaho State Bar No. 2306

Attorney for Employer

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

DAVID TARBET,	)	I.C. No. 2007-038938 and
	)	2007-012004
Claimant,)	
	)	EMPLOYER'S MOTION
v.	)	TO CONSOLIDATE
)	
J. R. SIMPLOT COMPANY,)	
)	
Self-Insured,)	
Employer/Defendant.)	
_____)	

COMES NOW, employer J. R. Simplot Company, by and through its attorney of record, Wes L. Scrivner and moves the Industrial Commission for an order consolidating I.C. No. 2007-012004 and I.C. No. 2007-038938. This motion is made because much of the same evidence and issues exist regarding both claims and a consolidation would result in the judicious use of Commission resources.

DATED this 29th day of November, 2007.



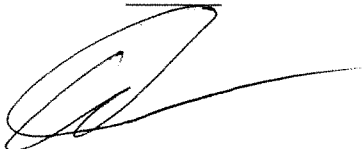
WES L. SCRIVNER
Attorney for Employer

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 2007, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Fred J. Lewis
Racine, Olson, Nye, Budge & Bailey, Chtd.
P. O. Box 1391
Pocatello, ID 83204-1391

☒ HAND DELIVERY
☐ U.S. MAIL
☐ OVERNIGHT MAIL
☐ FAX



WES L. SCRIVNER

**WORKERS' COMPENSATION
COMPLAINT AGAINST THE
INDUSTRIAL SPECIAL INDEMNITY FUND (ISIF)**

I. C. Nos. 2007-012004 & 2007-038938

CLAIMANT'S NAME AND ADDRESS David Tarbet 380 South First East, Apt. S Soda Springs, ID 83276	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS Fred J. Lewis P. O. Box 1391 Pocatello, ID 83204-1391
EMPLOYER'S NAME AND ADDRESS J. R. Simplot Company P. O. Box 27 Boise, ID 83707-0027	EMPLOYER'S ATTORNEY'S NAME AND ADDRESS Wes L. Scrivner, (ISB No. 2306) P. O. Box 27 Boise, Idaho 83707
I.C. NUMBER OF CURRENT CLAIM 2007-012004	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTERS) NAME AND ADDRESS J. R. Simplot Company, self-insured
DATE OF INJURY 4/5/07	

NATURE AND CAUSE OF PHYSICAL IMPAIRMENT PRE-EXISTING CURRENT INJURY OR OCCUPATIONAL DISEASE:

Lumbar fusion, rheumatoid arthritis, hypertension, and PTSD, all documented by medical records provided to ISIF with the Notice of Intent on October 14, 2008. The index of documents supplied to ISIF is attached hereto as Exhibit A.

STATE WHY YOU BELIEVE THAT THE CLAIMANT IS TOTALLY AND PERMANENTLY DISABLED:

Employer is not contending that Claimant is totally and permanently disabled, as that is the Claimant's burden.

DATE December 16, 2008

SIGNATURE OF PARTY OR ATTORNEY:

PRINT OR TYPE NAME: Wes L. Scrivner

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of December, 2008, I caused to be served a true and correct copy of the foregoing Complaint upon:

Manager, ISIF PO Box 83720
Dept. of Administration Boise, Idaho 83720-7901

via: ☐ personal service of process
☒ regular U.S. Mail

Claimant's Name Fred J. Lewis
P. O. Box 1391
Pocatello, ID 83204-1391
Address

via: ☐ personal service of process
☒ regular U.S. Mail

Employer's Name
Address

via: ☐ personal service of process
☐ regular U.S. Mail

Surety's Name
Address

via: ☐ personal service of process
☐ regular U.S. Mail

☐ I have not served a copy of the Complaint upon anyone.

Wes L. Scrivner

NOTICE:

Pursuant to the provisions of Idaho Code § 72-334, a notice of claim must first be filed with the Manager of ISIF not less than 60 days prior to the filing of a complaint against ISIF. You must attach a copy of Form IC 1001 Workers' Compensation Complaint, to this document. An Answer must be filed on Form IC 1003 within 21 days of service in order to avoid default.

DAVID TARBET v. J.R. SIMPLOT COMPANY

Case Nos. 2007-012004 and 2007-038938

#	DESCRIPTION
1	BEAR LAKE MEMORIAL HOSPITAL
2	POCATELLO ORTHOPAEDICS & SPORTS MEDICINE INSTITUTE, PA Benjamin Blair, M.D.
3	Clay I. Campbell, M.D.
4	CARIBOU MEMORIAL HOSPITAL
5	POCATELLO RADIOLOGY ASSOCIATES
6	PORTNEUF MEDICAL CENTER
7	Mary Himmler, M.D.
8	K. C. McGee, M.D.
9	CARIBOU MEDICAL CENTER Thomas W. Dorrell, M.D. John W. Obray, M.D., P.A.
10	INTERNAL MEDICINE & RHEUMATOLOGY Jonathan T. Paine, M.D.
11	IDAHO ORTHOPAEDIC SPORTS CLINIC Steven L. Coker, M.D. Kenneth E. Newhouse, M.D.
12	LAKEVIEW MEDICAL CLINIC Lee. R. Bules, D.O.
13	BANNOCK REGIONAL MEDICAL CENTER
14	BOWMAN CHIROPRACTIC
15	GENERAL NEUROSURGERY AND SPINE Scott Huneycutt, M.D.
16	PORTNEUF VALLEY PHYSICAL MEDICINE, INC. Eric C. Roberts, M.D.
17	PHYSICIANS IMMEDIATE CARE Terry Amiel, M.D.
18	SUMMIT ORTHOPAEDICS Gary C. Walker, M.D.
19	DEPARTMENT OF VETERANS AFFAIRS - SALT LAKE CITY -
20	Deposition of David Tarbet dated January 25, 2008

WORKERS' COMPENSATION COMPLAINT

I.C. No. 2007-038938

CLAIMANT'S (INJURED WORKER) NAME AND ADDRESS David Tarbet 380 South First East, Apt S Soda Springs, ID 83276 TELEPHONE NUMBER: 208-547-2465		CLAIMANT'S ATTORNEY'S NAME, ADDRESS, AND TELEPHONE NUMBER Fred J. Lewis Racine, Olson, Nye, Budge & Bailey, Chartered 201 E. Center - Center Street Plaza P. O. Box 1391 Pocatello, ID 83204-1391	
EMPLOYER'S NAME AND ADDRESS (at time of injury) J.R. Simplot Company c/o Wes Scrivner P.O. Box 27 Boise, ID 83707-0027		WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Self-Insured	
CLAIMANT'S SOCIAL SECURITY NO. <div style="background-color: black; width: 100px; height: 1.2em;"></div>	CLAIMANT'S BIRTHDATE <div style="background-color: black; width: 100px; height: 1.2em;"></div>	DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE May 13, 2007	
STATE AND COUNTY IN WHICH INJURY OCCURRED Caribou County, State of Idaho		WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE OF: \$1,168.00 , PURSUANT TO IDAHO CODE § 72-419	
DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED) Claimant was loosening bolts on a valve. As it came loose, it jerked injured Claimant.			
NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE Injured neck, shoulders, arms, hands and back.			
WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME? Medical Benefits, TTD benefits, PPI benefits, PPD benefits, and Total and Permanent Disability benefits.			
DATE OF WHICH NOTICE OF INJURY WAS GIVEN TO EMPLOYER May 13, 2007		TO WHOM NOTICE WAS GIVEN Gary Norman	
HOW NOTICE WAS GIVEN: <input checked="" type="checkbox"/> ORAL <input checked="" type="checkbox"/> WRITTEN <input type="checkbox"/> OTHER, PLEASE SPECIFY			
ISSUE OR ISSUES INVOLVED Entitlement to Medical benefits Entitlement to TTD benefits Entitlement to PPI benefits Entitlement to PPD benefits Entitlement to Total and Permanent Disability benefits			
DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO IS SO, PLEASE STATE WHY			

NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND MUST BE IN ACCORDANCE WITH IDAHO CODE § 72-334 AND FILED ON FORM I.C. 1002

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)

Dr. Campbell, Montana

Dr. Mary Himmler, Pocatello, Idaho

WHAT MEDICAL COSTS HAVE you INCURRED TO DATE? Unknown

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY? \$Unknown
IF ANY? \$Unknown

WHAT MEDICAL COSTS HAVE YOU PAID,

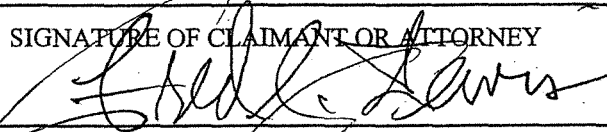
I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE.

☒ YES☐ NO

DATE

11/13/07

SIGNATURE OF CLAIMANT OR ATTORNEY

PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITSNAME AND SOCIAL SECURITY NUMBER OF
PARTY FILING COMPLAINT

DATE OF DEATH

RELATION TO DECEASED CLAIMANT

WAS FILING PARTY DEPENDENT ON DECEASED?

☐ YES☐ NO

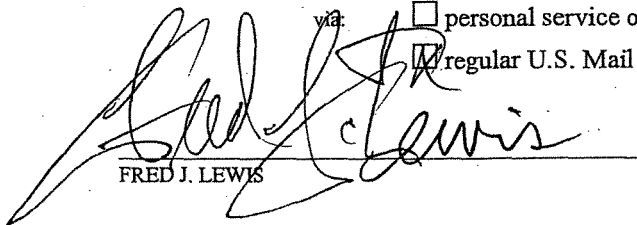
DID FILING PARTY LIVE WITH DECEASED AT TIME OF ACCIDENT?

☐ YES☐ NO**CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM****CERTIFICATE OF SERVICE**hereby certify that on the 13 day of November, 2007, I caused to be served a true and correct copy of the foregoing Complaint upon:

EMPLOYER'S NAME AND ADDRESS

J.R. Simplot Company
c/o Wes Scrivner
P.O. Box 27
Boise, ID 83707-0027

SURETY'S NAME AND ADDRESS

Pinnacle Risk Management Services
960 Broadway Ave, Ste 160
Boise, ID 83706-3670via: ☐ personal service of process☒ Certified U.S. Mailvia: ☐ personal service of process☒ regular U.S. Mail
FRED J. LEWIS**NOTICE: An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. If no answer is filed, Default Award may be entered!**

Further information may be obtained from: Industrial Commission, Judicial Division, P.O. Box 83720, Boise, Idaho 83720-0041 (208) 334-6000.

INDUSTRIAL COMMISSION
P.O. BOX 83720
MOISE, ID 83720-0041

Patient Name: David Tarbet
Birth Date: [REDACTED]
Address: 380 South 1st East, Apt S, Soda Springs, Id 83276
Phone Number: (208) 547-2465
SSN or Case Number: 519-52-0447

(Provider Use Only)
Medical Record Number: _____
☐ Pick up Copies ☐ Fax Copies # _____
☐ Mail Copies _____
ID Confirmed by: _____

AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION

I hereby authorize _____ to disclose health information as specified:

Provider Name - must be specific for each provider

For:

Insurance Company/Third Party Administrator/ Self Insured Employer/ISIF, their attorneys or patient's attorney

Street Address

City

State

Zip Code

Purpose of need for data:

(e.g. Worker's Compensation Claim)

Information to be disclosed:

Date(s) of Hospitalization/Care: _____

- ☐ Discharge Summary
- ☐ History & Physical Exam
- ☐ Consultation Reports
- ☐ Operative Reports
- ☐ Lab
- ☐ Pathology
- ☐ Radiology Reports
- ☐ Entire Record
- ☐ Other: Specify _____

I understand that the disclosure may include information relating to (check if applicable):

- ☐ AIDS or HIV
- ☐ Psychiatric or Mental Health Information
- ☐ Drug /Alcohol Abuse Information

I understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. **Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim.** Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.

David Tarbet

Signature of Patient

Signature of Legal Representative & Relationship to Patient/Authority to Act

Signature of Witness

Original: Medical Record Copy: Patient

11-13-07
Date
10/13/07
Date

Date

Complaint

17

WORKERS' COMPENSATION COMPLAINT

I.C. No. 2007-012004

CLAIMANT'S (INJURED WORKER) NAME AND ADDRESS

David Tarbet
380 South First East, Apt S
Soda Springs, ID 83276

TELEPHONE NUMBER: 208-547-2465

CLAIMANT'S ATTORNEY'S NAME, ADDRESS, AND TELEPHONE NUMBER

Fred J. Lewis
Racine, Olson, Nye, Budge & Bailey, Chartered
201 E. Center - Center Street Plaza
P. O. Box 1391
Pocatello, ID 83204-1391

EMPLOYER'S NAME AND ADDRESS (at time of injury)

J.R. Simplot Company
c/o Wes Scrivner
P.O. Box 27
Boise, ID 83707-0027

WORKERS' COMPENSATION INSURANCE CARRIER'S
(NOT ADJUSTOR'S) NAME AND ADDRESS

Self-Insured

CLAIMANT'S SOCIAL SECURITY NO.

[REDACTED]

CLAIMANT'S BIRTHDATE

[REDACTED]

DATE OF INJURY OR MANIFESTATION OF OCCUPATIONAL DISEASE

April 5, 2007

STATE AND COUNTY IN WHICH INJURY OCCURRED

Caribou County, State of Idaho

WHEN INJURED, CLAIMANT WAS EARNING AN AVERAGE WEEKLY WAGE

OF: \$1,168.00 , PURSUANT TO IDAHO CODE § 72-419

DESCRIBE HOW INJURY OR OCCUPATIONAL DISEASE OCCURRED (WHAT HAPPENED)

Claimant steam cleaning pumps at Conda Station and wand kicked back and injured Claimant.

NATURE OF MEDICAL PROBLEMS ALLEGED AS A RESULT OF ACCIDENT OR OCCUPATIONAL DISEASE

Injured neck, shoulders, arms and hands.

WHAT WORKERS' COMPENSATION BENEFITS ARE YOU CLAIMING AT THIS TIME?

Medical Benefits, TTD benefits, PPI benefits, PPD benefits, and Total and Permanent Disability benefits.

DATE OF WHICH NOTICE OF INJURY WAS GIVEN TO

EMPLOYER
April 5, 2007

TO WHOM NOTICE WAS GIVEN

Bill Horsley

HOW NOTICE WAS GIVEN:

☒ ORAL

☒ WRITTEN

☐ OTHER, PLEASE SPECIFY

ISSUE OR ISSUES INVOLVED

Entitlement to Medical benefits
Entitlement to TTD benefits
Entitlement to PPI benefits
Entitlement to PPD benefits
Entitlement to Total and Permanent Disability benefits

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? ☐ YES ☒ NO IS SO, PLEASE STATE WHY

NOTICE: COMPLAINTS AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND MUST BE IN ACCORDANCE WITH IDAHO CODE § 72-334 AND FILED ON FORM I.C. 1002

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS)

Dr. Campbell, Montana
Dr. Benjamin Blair, Pocatello, Idaho

Dr. Mary Himmeler, Pocatello, Idaho

WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE? Unknown

WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY? \$Unknown

WHAT MEDICAL COSTS HAVE YOU PAID, IF ANY? \$Unknown

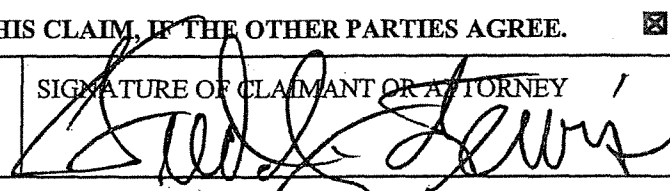
I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE.

☒ YES☐ NO

DATE

11/13/07

SIGNATURE OF CLAIMANT OR ATTORNEY



PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW
ONLY IF CLAIM IS MADE FOR DEATH BENEFITS

NAME AND SOCIAL SECURITY NUMBER OF PARTY FILING COMPLAINT

DATE OF DEATH

RELATION TO DECEASED CLAIMANT

WAS FILING PARTY DEPENDENT ON DECEASED?

☐ YES☐ NO

DID FILING PARTY LIVE WITH DECEASED AT TIME OF ACCIDENT?

☐ YES☐ NO**CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM****CERTIFICATE OF SERVICE**

I hereby certify that on the 13 day of November, 2007, I caused to be served a true and correct copy of the foregoing Complaint upon:

EMPLOYER'S NAME AND ADDRESS

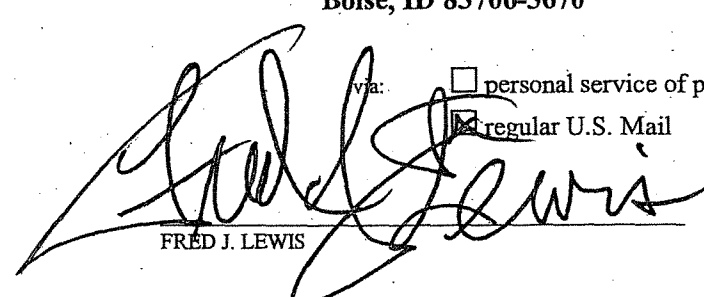
J.R. Simplot Company
c/o Wes Scrivner
P.O. Box 27
Boise, ID 83707-0027

SURETY'S NAME AND ADDRESS

Pinnacle Risk Management Services
960 Broadway Ave, Ste 160
Boise, ID 83706-3670

via: ☐ personal service of process☒ Certified U.S. Mail

via:

☐ personal service of process☒ regular U.S. Mail

FRED J. LEWIS

NOTICE: An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. If no answer is filed, Default Award may be entered!

Further information may be obtained from: Industrial Commission, Judicial Division, P.O. Box 83720, Boise, Idaho 83720-0041 (208) 334-6000.

INDUSTRIAL COMMISSION
P.O. BOX 83720
MOISE, ID 83720-0041

Patient Name: David Tarbet
Birth Date: [REDACTED]
Address: 380 South 1st East, Apt S, Soda Springs, Id 83276
Phone Number: (208) 547-2465
SSN or Case Number: 519-52-0447

(Provider Use Only)

Medical Record Number: _____

☐ Pick-up Copies ☐ Fax Copies # _____

☐ Mail Copies

ID Confirmed by: _____

AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION

I hereby authorize _____ to disclose health information as specified:

Provider Name - must be specific for each provider

for: _____
Insurance Company/Third Party Administrator/ Self Insured Employer/ISIF, their attorneys or patient's attorney

Street Address

City

State

Zip Code

Purpose of need for data:

(e.g. Worker's Compensation Claim)

Information to be disclosed:

Date(s) of Hospitalization/Care: _____

- ☐ Discharge Summary
- ☐ History & Physical Exam
- ☐ Consultation Reports
- ☐ Operative Reports
- ☐ Lab
- ☐ Pathology
- ☐ Radiology Reports
- ☐ Entire Record
- ☐ Other: Specify _____

I understand that the disclosure may include information relating to (check if applicable):

- ☐ AIDS or HIV
- ☐ Psychiatric or Mental Health Information
- ☐ Drug /Alcohol Abuse Information

I understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. **Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim.** Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.

Signature of Patient

Signature of Legal Representative & Relationship to Patient/Authority to Act

Signature of Witness

Original: Medical Record Copy: Patient

Date

Date

Date

Complaint

20

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID TARBET,

Claimant,

v.

J. R. SIMPLOT COMPANY,

Self-Insured
Employer,

Defendant.

IC 2007-012004
2007-038938

ORDER TO CONSOLIDATE

FILED

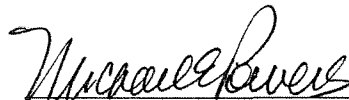
DEC 20 2007

INDUSTRIAL COMMISSION

Pursuant to the Motion to Consolidate filed by Defendant's counsel on December 4, 2007, the Industrial Commission of the State of Idaho hereby ORDERS that those claims presently pending before the Commission known as IC Numbers 2007-012004 and 2007-038938 are consolidated into a single proceeding. Future pleadings require reference to the **two** IC numbers listed above, but only a single document need be filed with the Commission.

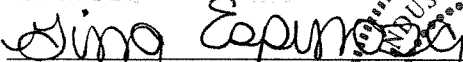
DATED this 20th day of December, 2007.

INDUSTRIAL COMMISSION



Michael E. Powers, Referee

ATTEST:


Assistant Commission Secretary



ORDER TO CONSOLIDATE

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December, 2007, a true and correct copy of the foregoing **ORDER TO CONSOLIDATE** was served by regular United States mail upon each of the following persons:

FRED J LEWIS
PO BOX 1391
POCATELLO ID 83204-1391

WES L SCRIVNER
PO BOX 27
BOISE ID 83707

Gina Espinosa

ge

ANSWER TO COMPLAINT

I.C. NO. 07-012004

INJURY DATE 4/5/07

- ☐ The above-named employer or employer/surety responds to Claimant's Complaint by stating:
- ☒ The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

<p>CLAIMANT'S NAME AND ADDRESS</p> <p>David Tarbet 380 South Frist East, Apt. S Soda Springs, ID 83276</p>	<p>CLAIMANT'S ATTORNEY'S NAME AND ADDRESS</p> <p>Fred J. Lewis P.O. Box 1391 Pocatello, ID 83204</p>
<p>EMPLOYER'S NAME AND ADDRESS</p> <p>J.R. Simplot Company P.O. Box 27 Boise, ID 83707</p>	<p>WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS</p> <p>J.R. Simplot Company, self-insured</p>
<p>ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS)</p> <p>Wes L. Scrivner P.O. Box 27 Boise, ID 83707</p>	<p>ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS)</p> <p>Lawrence E. Kirkendall Kirkendall Law Office, CHTD 2995 North Cole Road, Suite 260 Boise, ID 83704</p>

IT IS: (Check One)	
Admitted	Denied
	X *
	X *
	X *
	X *
N/A	N/A
	X *
UNKNOWN	UNKNOWN
	X *

1. That accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
2. That the employer/employee relationship existed.
3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
4. That the condition for which benefits are claimed was caused partly ___ entirely ___ by an accident arising out of and in the course of Claimant's employment.
5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident of 60 days of the manifestation of such occupational disease.
7. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, § 72-419: \$_____.
8. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

9. What benefits, if any, do you concede are due Claimant?

2007 JAN -9 A 11:27
INDUSTRIAL COMMISSION

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10. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

ISIF denies the following:

1. That the Claimant is totally and permanently disabled;
2. That it is liable for any benefits under I.C. 72-332;
3. That any preexisting injury or condition was exacerbated by the industrial accident;
4. That any preexisting injury or condition combined with the industrial injury to render the Claimant totally and permanently disabled;
5. That any preexisting injury or condition constituted a hindrance and obstacle to employment, I.C. 72-332;

ISIF asserts the following:

1. If the Claimant is found to be totally and permanently disabled, the disablement was proximately caused by the natural progression of Claimant's preexisting injury or condition, and not by the industrial accident;
2. That the claimant was already totally and permanently disabled at the time of the accident;
3. That the Claimant is capable of gainful employment, and such employment is reasonably available.

Defendants reserve the right to amend this answer to allege all appropriate affirmative defenses as those defenses become known to the defendants.

Under the Commission rules, you have 21 days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule 3.D., Judicial Rule of Practice and Procedure under the Idaho workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. ☐ YES ☒ NO, NOT AT THIS TIME

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE. No.

Amount of Compensation Paid to Date			Dated 1/8/09	Signature of Defendant or Attorney 
PPI/PPD	TTD	Medical		
ISIF had paid no compensation				

PLEASE COMPLETE

I hereby certify the on the 8th day of January, 2009, I caused to be served a true and correct copy of the foregoing Answer upon:

CLAIMANT'S NAME AND ADDRESS David Tarbet c/o Fred J. Lewis P.O. Box 1391 Pocatello, ID 83204	EMPLOYER AND SURETY'S NAME AND ADDRESS J.R. Simplot Company, self-insured c/o Wes L. Scrivner P.O. Box 27 Boise, ID 83707	INDUSTRIAL SPECIAL INDEMNITY FUND (if applicable) Verlene Wise Industrial Special Indemnity Fund P.O. Box 83720 Boise, ID 83720
--	---	--

Via: ☐ personal service of process
☒ regular U.S. Mail

Via: ☐ personal service of process
☒ regular U.S. Mail

Via: ☐ personal service of process
☒ regular U.S. Mail

Signature



Answer

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J.R. SIMPLOT COMPANY 999 MAIN STREET BOISE, IDAHO 83702
P.O. BOX 27 BOISE, IDAHO 83707
(208) 336-2110 FAX (208) 389-7515

CORPORATE HEADQUARTERS

January 15, 2010

Via Facsimile: 332-7558

Referee Michael E. Powers
Idaho Industrial Commission
P.O. Box 83720
Boise, Idaho 83720-0041

Re: *David Tarbet v. J. R. Simplot Company*
I. C. Nos. 2007-012004 and 2007-038938

Dear Referee Powers:

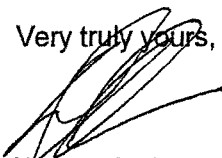
The last post-hearing deposition has been taken, the transcript has been completed, and once the original is received we will lodge it with the Commission.

The parties would normally request a briefing schedule at this point; however, all parties have agreed to present oral argument to the Commission, as opposed to filing briefs. In reviewing JRP 11 A., the filing of briefs appears to be permissive rather than mandatory, and in this case the parties do not wish to file briefs.

If presentation of oral closing argument is acceptable, the most expeditious way to accomplish scheduling the same would be to convene a telephone conference call at which time the Referee and the parties could establish a date and place for argument.

Thank you for your consideration.

Very truly yours,



Wes L. Scrivner
Assistant General Counsel

WLS:ts

cc: Fred Lewis
Lawrence Kirkendall
Cindy Weigel
Roy Galbreath

FILED

JAN 15 2010

INDUSTRIAL COMMISSION

Bringing Earth's Resources to Life

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID TARBET,)
)
Claimant,)
)
v.)
)
J. R. SIMPLOT COMPANY,)
)
Self-Insured)
Employer,)
)
and)
)
STATE OF IDAHO, INDUSTRIAL)
SPECIAL INDEMNITY FUND,)
)
Surety,)
)
Defendants.)
_____)

IC 2007-012004
2007-038938

NOTICE OF ORAL
ARGUMENT

FILED

FEB 02 2010

INDUSTRIAL COMMISSION

Pursuant to the telephone conference conducted by Referee Michael E. Powers with the parties on February 1, 2010,

NOTICE IS HEREBY GIVEN that oral argument will be held in the above-entitled matter on February 5, 2010, at 10:00 a.m., in the Industrial Commission hearing room, 700 S. Clearwater Lane, City of Boise, County of Ada, State of Idaho.

DATED this 2nd day of February, 2010.

INDUSTRIAL COMMISSION



Michael E. Powers, Referee

NOTICE OF ORAL ARGUMENT - 1

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of February, 2010 a true and correct copy of the **NOTICE OF ORAL ARGUMENT** was served by *facsimile transmission* upon each of the following:

Fred J. Lewis ***FAX: (208) 232-6109***

Wes Scrivner ***FAX: (208) 389-7464***

Lawrence Kirkendall ***FAX: (208) 345-4859***

E-mailed to Dean Willis

ge

Gene E. Williams

TRANSACTION REPORT

P. 01

FEB-02-2010 TUE 09:35 AM

BROADCAST

DATE	START	RECEIVER	TX TIME	PAGES	TYPE	NOTE	M#	DP
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	09:34 AM	93897464	17"	2	SEND	OK	648	
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TOTAL :						56S PAGES:	6	

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID TARBET,

Claimant,

v.

J. R. SIMPLOT COMPANY,

Self-Insured
Employer,

and

STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND,

Surety,

Defendants.

IC 2007-012004
2007-038938

NOTICE OF ORAL
ARGUMENT

FILED

FEB 02 2010

INDUSTRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID TARBET,)
)
 Claimant,)
)
 v.)
)
 J. R. SIMPLOT COMPANY,)
)
 Self-Insured Employer,)
)
 and)
)
 STATE OF IDAHO, INDUSTRIAL)
 SPECIAL INDEMNITY FUND,)
)
 Defendants.)
 _____)

FILED
JUN 14 2010
INDUSTRIAL COMMISSION

IC 2007-012004
2007-038938

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers, who conducted a hearing in Pocatello on December 10, 2009. Claimant was present and represented by Fred J. Lewis of Pocatello. Wes L. Scrivner of Boise represented Employer, and Lawrence E. Kirkendall of Boise represented the Industrial Special Indemnity Fund ("ISIF"). The parties presented oral and documentary evidence and two post-hearing depositions were taken. In lieu of post-hearing briefs, the parties presented oral closing arguments in Boise on February 5, 2010. This matter came under advisement on February 17, 2010.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 1

ISSUES

By agreement of the parties, the issues to be decided are:

1. Whether Claimant is entitled to benefits for permanent partial disability in excess of impairment, and the extent thereof;
2. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine or otherwise;
3. Whether apportionment for a preexisting condition pursuant to Idaho Code § 72-406 is appropriate;
4. Whether ISIF is liable under Idaho Code § 72-332; and, if so,
5. Apportionment under the *Carey* formula.

REMAINING ISSUES AND CONTENTIONS OF THE PARTIES

Employee and ISIF both retained vocational rehabilitation consultants to investigate the extent of Claimant's disability as it pertains to employability. After interviewing Claimant, reviewing his medical records and conducting vocational assessments, they each concluded that Claimant is totally and permanently disabled. In addition, at the hearing and in their closing arguments, the parties agreed or, in the case of Employer, did not dispute, these opinions. Therefore, the Referee finds sufficient evidence to conclude, at the outset, that Claimant is totally and permanently disabled. As a result, the only remaining question to be decided is whether and to what extent ISIF is liable for a portion of Claimant's benefits.

Employer contends that ISIF is liable because Claimant's total and permanent disablement is due to a combination of his pre-existing permanent impairments to his eardrum and lower back, together with the cervical spine injury he sustained in his last industrial accident

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 2

in April 2007.¹ Employer seeks findings that Claimant's pre-existing impairments were manifest, constituted subjective hindrances to employment, and "combined" with injuries sustained in Claimant's last accident such as to trigger ISIF liability.

ISIF maintains that Claimant's permanent and total disability is due to his final industrial accident alone. ISIF seeks a finding that Claimant became totally and permanently disabled solely as a result of his April 2007 industrial accident and resulting cervical injury so that it cannot be held liable for any portion of Claimant's benefits.

OBJECTIONS

ISIF's objection on page 21 of the transcript of the deposition of Gary C. Walker, M.D., is overruled; to the extent not mooted by follow-up inquiry, Employer's objection on page 49 and Claimant's objection on page 59 of the transcript of the deposition of Nancy Collins, Ph.D., are also overruled.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The pre-hearing deposition of Claimant dated January 25, 2008;
2. The pre-hearing deposition of Claimant dated October 7, 2009;
3. The testimony of Claimant, Claimant's wife Sandra Tarbet, and Claimant's former supervisor Gary Norman, taken at the hearing;
4. Claimant's Exhibits A-C admitted at the hearing;
5. Employer's Exhibits 1-21 admitted at the hearing;

¹ Claimant also suffered an industrial accident on or about May 13, 2007. However, none of the injuries from that accident are relevant to this decision so the April 2007 accident is referred to herein as the "last accident."

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 3

6. ISIF's Exhibits 1-31 admitted at the hearing;
7. The post-hearing deposition of William C. Jordan, M.A., vocational rehabilitation consultant, taken by ISIF on January 5, 2010;
8. The post-hearing deposition of Nancy J. Collins, Ph.D., vocational rehabilitation consultant, taken by Employer on January 5, 2010; and
9. The post-hearing deposition of Gary C. Walker, M.D., taken by Employer on January 7, 2010.

After having considered all the above evidence and briefs of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

FINDINGS OF FACT

1. Claimant was 62 years of age and resided in Soda Springs, a small, somewhat isolated community of approximately 3,500 residents, at the time of the hearing. Claimant finished 10th grade, served in the armed forces in Vietnam, then worked for Employer for 36 years.

2. Claimant developed specialized skills working for Employer. Over the years, he performed a number of jobs at the Smoky Mountain Mine and, later, at the Conda Pump Station ("Conda") in Soda Springs. At Conda, Claimant was part of a 24-7 operation maintaining giant pumps that pull phosphorous ore slurry through a pipeline, 30 miles west from Smoky Mountain, then push it 58 miles over a mountain pass, to Employer's plant in Pocatello.

3. At times Claimant was a maintenance worker, performing continuous heavy work such as loosening and torquing down oversized bolts that were often located overhead or in other difficult to reach areas. At other times he was employed in operations, where heavy work was

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 4

only required during emergencies. Claimant was well-suited to working at Conda because he was inordinately strong, standing 6'4" and weighing in the mid-to-high 200-pound range. In addition, he applied an exemplary work ethic.

4. It is undisputed that Claimant greatly enjoyed working for Employer and that he was a valued employee. However, he did not always function well with others. In 2001, Claimant was written up after coworkers complained about his intimidating behavior. Claimant attributed these incidents to temper flares, which he later believed were due to post-traumatic stress disorder ("PTSD"), addressed below, and his hearing problem because it made him speak loudly. The only other write-up Claimant ever received was in 2006, after he failed to report he had strained his back in a timely manner, as required under Employer's safety policy.

5. Claimant managed the following relevant physical and psychological conditions while working for Employer:

a. Rheumatoid Arthritis ("RA"): Claimant has been afflicted with RA in his wrists, hips, shoulders and elbows for over 30 years. He accommodated his RA at work by taking medication, duct-taping towels around his wrists to keep them warm and just working through the pain. Claimant testified that he never missed a day of work due to this condition. Further, Claimant has not suffered any excess degeneration of his affected joints as a result of his RA. The Referee finds that Claimant's RA is not a factor contributing to his total and permanent disablement.

b. Post-Traumatic Stress Disorder ("PTSD"): Claimant's PTSD is a result of his experiences in Vietnam. Claimant was unaware of his PTSD until 2008, when he was diagnosed by Thomas R. Mullin, Ph.D., a psychologist. Claimant's PTSD causes

occasional temper flares and short-term memory loss, discomfort in social situations, and difficulty sleeping, but does not produce physical symptoms. Claimant attended an extended inpatient PTSD treatment program in 2009, and he continues to participate in on-going group therapy sessions and has made progress with his condition. The Referee finds that Claimant's PTSD is not a factor contributing to his total and permanent disability.

c. Depression: Claimant has experienced bouts of depression for several years. He treats his depression symptoms with medication. The Referee finds that Claimant's depression is not a contributing factor to his total and permanent disability.

d. No impairment ratings: Claimant has never received an impairment rating for any of these conditions; however, he is receiving benefits for a 70% service-connected disability related to his PTSD.

6. Claimant also experienced a string of industrial accidents requiring surgery while working for Employer.

a. Eardrum: In 1990, Claimant punctured his right eardrum, for which he underwent tympanoplasty surgery by John H. Thomas, M.D., an otolaryngologist. Claimant returned to work after his eardrum injury, accommodating his associated hearing problem by asking coworkers to repeat themselves and training his "good ear" toward people when he knew they were speaking to him. Still, he could not hear in the presence of background noise, so he would sometimes miss information directed to him. Likewise, Claimant accommodated his balance problems by making sure he had a grip on something stable whenever he had to work at heights, or by enlisting someone else to do

those jobs. Claimant's eardrum injury precipitated total deafness in his right ear by sometime in 2005 or 2006, as well as vestibular (balance) problems that increased as his hearing declined. Kraig C. McGee, M.D., an otolaryngologist, assessed whole person permanent partial impairment ratings of 8% to Claimant's hearing impairment and 10% to his vestibular impairment. The Referee finds that Claimant's ear problem is not a contributing factor in his total and permanent disability.

b. Knee: In 1999, Claimant twisted his right knee at work, for which he underwent partial meniscectomy in March 2000 by Steven L. Coker, M.D., an orthopedic surgeon. Claimant recovered fully from his knee injury, and returned to work with no significant residual symptoms. The Referee finds that Claimant's knee problem is not a contributing factor in his total and permanent disability.

c. Lower back: By 2001, Claimant had suffered two lower back injuries, for which he underwent a laminectomy and partial discectomy surgery in July 2001 by Scott Huneycutt, M.D., a neurosurgeon. Claimant also returned to work after his lumbar spine surgery, although his recovery was slow and difficult. When it appeared that he may never again be able to return to work at Employer's because of a permanent lifting restriction, Claimant worked out hard to strengthen his muscles, then convinced Eric Roberts, M.D., his treating physiatrist, to release him without restrictions. Employer also played a role by allowing Claimant to return as an operator (as opposed to a maintenance worker) to reduce the strain on his back. At work, Claimant further accommodated his low back problems by letting others do the heavy tasks when he could. Otherwise, Claimant performed the duties required of his operator job, from April 2002 until his last

industrial accident, in April 2007. Gary C. Walker, M.D., a physiatrist, assessed a 10% whole person permanent partial impairment rating to Claimant's lower back condition. The Referee finds that Claimant's back condition was not a contributing factor in his total and permanent disability.

7. Claimant's final industrial accident occurred in April 2007, when he injured his cervical spine while pressure washing a pump. Claimant underwent a bi-level anterior cervical discectomy and decompression surgery in July 2007 and a bi-level anterior cervical fusion surgery in December 2007, both by Benjamin Blair, M.D., an orthopedic surgeon.

8. Claimant attempted to return to full-time work after his first cervical spine surgery. However, after 10 days or so, he reinjured his neck. As a result, he was required to undergo a revision surgery in December 2007. Afterward, Dr. Blair permanently restricted Claimant from lifting more than 5 pounds above waist level on a continuous basis, or 10 pounds occasionally. He also restricted Claimant from repetitive squatting, crawling, kneeling, stairs, step ladder or ladder climbing, and further restricted him from more than occasional rotational positions with sitting, rotational standing or bending forward.

9. Claimant's permanent lifting and mobility restrictions relegate him to jobs classified as "sedentary" in addition to a few that could be considered "light duty." As a result, Claimant is physically disqualified from returning to work for Employer, in any position, at the Conda Pump Station.

10. Dr. Blair assessed a whole person permanent partial impairment rating of 18% to Claimant's cervical spine condition. Dr. Blair initially stated Claimant's permanent restrictions in a letter dated November 19, 2008 to a claims examiner for Employer's third party

administrator. In that letter, Dr. Blair opined, "I would apportion 100% to the [cervical spine] injury and 0% to preexisting conditions." Ex. 14, p. 156. On August 17, 2009, however, Dr. Blair authored a follow-up letter in which he attributed the lifting restrictions only, to Claimant's cervical spine injury, and the mobility restrictions to his preexisting lower back condition. The Referee finds that Claimant's 5-pound lifting restriction is due to his cervical spine injury and is a material factor contributing to his total and permanent disablement.

11. After the December 2007 surgery, Dr. Blair advised Claimant that the first surgery had damaged his vocal cords. Claimant explained this is why the more he talks, the hoarser he gets, as he demonstrated at the hearing. The Referee finds Claimant's inability to talk reliably without going hoarse is a significant factor mitigating against his ability to perform customer service jobs.

12. Also after Claimant's last industrial injury, he was assessed a 1% whole person permanent impairment rating for carpal tunnel syndrome ("CTS"). Dr. Walker imposed this impairment rating following his August 26, 2009 independent medical examination ("IME") based upon clinical evidence of a borderline abnormal Tinel's response and a 2007 electromyogram confirming mild CTS. Dr. Walker noted that Claimant had significant intermittent symptoms, in that his hands go numb when he drives, but no atrophy or weakness as a result of his CTS. Further, Dr. Walker did not issue any restrictions. The Referee finds that Claimant's CTS is not a contributing factor in his total and permanent disability.

13. Nancy Collins, Ph.D., the vocational rehabilitation consultant retained by Employer, opined that it would take a sympathetic employer to hire Claimant. She explained that Claimant's lifting and mobility restrictions limit him to cashiering and customer service

positions, but Claimant is not a good candidate for these jobs because of his hearing impairment and, potentially, his personality characteristics. “The combination of Mr. Tarbet’s hearing loss and balance issues and his physical limitations for his low back and neck, makes returning to work very difficult...He is realistically, totally disabled from traditional, full-time work in his labor market.” Ex. 6, p. 8.

14. Bill Jordan, M.A., the vocational rehabilitation consultant retained by ISIF, opined that Claimant is totally and permanently disabled as a result of his lifting restrictions due to the cervical spine injury, alone. “He wouldn’t have a relevant labor market available to him after the restrictions Dr. Blair placed on him.” Ex. 28, p. 27.

15. Claimant presented well at the hearing, appeared younger than his age, is not “disabled-looking,” and knows many potential employers in the community. He is motivated to work and has transferrable skills in heavy equipment operation, mechanical work, truck driving, materials ordering, inventory, welding, diagnostics/repair and trouble-shooting, and basic computer operation. Nevertheless, Claimant was unable to obtain a job offer, even after a 14-month search in which he submitted approximately 20 applications to local businesses.

DISCUSSION AND FURTHER FINDINGS

The provisions of the Workers’ Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). However, the Commission is not required to construe facts liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION - 10

ISIF liability.

Idaho Code § 72-332 (2) provides that ISIF is liable for the remainder of an employee's income benefits, over and above the benefits to which an employee is entitled solely attributable to an industrial injury, when the industrial injury combines with a preexisting permanent physical impairment to result in total and permanent disablement of the employee. "Permanent physical impairment" is as defined in Idaho Code § 72-422, provided, however, as used in this section such impairment must be a permanent condition, whether congenital or due to injury or disease, of such seriousness as to constitute a hindrance or obstacle to obtaining employment or to obtaining re-employment if the claimant should become unemployed. *Id.* This shall be interpreted subjectively as to the particular employee involved; however, the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the preexisting physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

In *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court listed four requirements a claimant must meet to establish ISIF liability under Idaho Code § 72-332:

- (1) Whether there was indeed a preexisting impairment;
- (2) Whether that impairment was manifest;
- (3) Whether the alleged impairment was a subjective hindrance to employment; and
- (4) Whether the alleged impairment in any way combines with the subsequent injury to cause total disability.

Dumaw, 118 Idaho at 155, 795 P.2d at 317.

16. The Idaho Supreme Court has identified two theories under which ISIF can escape liability by establishing the absence of the requisite “combination” under the fourth prong of *Dumaw*. First, if Claimant was totally and permanently disabled (an “odd-lot” worker) immediately prior to the relevant industrial injury, the combination requirement cannot be satisfied. *Bybee v. State, Indus. Special Indem. Fund*, 129 Idaho 76, 921 P.2d 1200 (1996). Second, there is no combination if the disability would have been total regardless of preexisting conditions. *Selzler v. State of Idaho, Industrial Special Indemnity Fund*, 124 Idaho 144, 857 P.2d 623 (1993). Here, ISIF has elected to argue the latter proposition.

17. Employer relies heavily upon the opinion of Dr. Collins to support its position that Claimant would still be employable, if not for his preexisting impairments. She concluded that, after a short training period, Claimant would be able to work as a cashier or in a customer service job, if not for Claimant’s deafness in his right ear.

18. Employer also relies upon Dr. Blair’s *second* opinion concerning apportionment, revised to assign 100% of Claimant’s mobility restrictions to his preexisting lumbar spine injury, but leaving intact his apportionment of 100% of Claimant’s 5-pound lifting restriction to his cervical spine injury. Although Dr. Blair’s unexplained change of opinion from 2008 to 2009 is problematic, it is unnecessary to nitpick this point because the Referee finds Claimant is totally and permanently disabled solely as a result of his 5-pound lifting restriction, plus his nonmedical factors. The Referee also finds sufficient evidence to establish that the lifting restriction is due to Claimant’s last industrial injury.

19. Although the parties stipulated to, or did not dispute, Claimant’s total permanent disability status, they disagree as to how Claimant’s various physical impairments and

nonmedical factors add up to get him there. As a result, some discussion and findings pertaining to Claimant's odd-lot status are necessary.

20. An injured worker may prove that he or she is an odd-lot worker in one of three ways (1) by showing he or she has attempted other types of employment without success; (2) by showing that he or she or vocational counselors or employment agencies on his or her behalf have searched for other suitable work and such work is not available; or, (3) by showing that any effort to find suitable employment would be futile. *Hamilton v. Ted Beamis Logging and Construction*, 127 Idaho 221, 224, 899 P.2d 434, 437 (1995).

21. Claimant has failed to prove odd-lot status by the first method because he never attempted employment without success. However, the Referee finds Claimant has established odd-lot status by the second and third methods for the following reasons. First, the evidence in the record establishes that Claimant's, Dr. Collins' and Mr. Jordan's employment searches on Claimant's behalf all met with failure. Along those lines, Claimant submitted approximately 20 applications over a 14-month period without ever even being given an interview. Second, the Referee finds that Claimant was sincere in his job search and, no doubt, would be working if given a reasonable opportunity. Third, the Referee finds that due to Claimant's 5-pound lifting restriction due to his cervical injury and his nonmedical factors, as described more fully below, it would be futile for him to continue looking for work.

22. The nonmedical factors under scrutiny include Claimant's age, education, transferrable skills, and the Soda Springs labor market, as they affect his employability.

- a. Age: Claimant is an older worker. Surmising that age is not a significant factor in Claimant's case because he looks young and knows everyone, Dr. Collins nevertheless

opined that, although he could learn on the job, "...at his age of 62, many employers will not be willing to train him." Ex. 6, p. 5. Along those lines, Claimant testified that because he knows many potential employers in the community, they are aware of his disabilities.

b. Education: Claimant possesses a formal education through the 10th grade, with specialized on-the-job training through the years. Dr. Collins explained that Claimant's education level makes it more difficult for him to find a sedentary job. However, neither she nor Mr. Jordan believed Claimant's education was a prime factor in preventing him from working because he had transferrable skills, was bright and motivated, and also possessed a great deal of experience.

c. Transferrable skills: Dr. Collins identified Claimant's transferrable skills as: heavy equipment operation, mechanical aptitude and skill, truck driving, materials ordering, inventory, welding skills, diagnostics/repair and trouble shooting, and basic computer operation. Then she ruled out jobs where he could apply these skills because they "require too much sitting or standing." Ex. 6, p. 6. Dr. Collins' opinion does not recognize that Claimant is also precluded from these jobs for other reasons. Claimant's 5-pound lifting restriction prevents him from driving truck, operating heavy equipment and doing most welding tasks. Dr. Collins suggested that Claimant could perform jobs requiring basic computer skills, such as cashiering, customer service or sales, if not for his hearing problem. However, she clearly states in her opinion that Claimant would need good hearing *and* "a personality to work in customer service roles" in order to do these jobs, given his physical restrictions. Ex. 6, p. 7. She also states, "...his hearing and

lack of customer service skill will preclude most of this work.” *Id.* Reading Dr. Collins’ opinion as a whole, rather than relying on just her concluding statement, the Referee is persuaded that Claimant would need more acute hearing, as well as some customer service aptitude, to be a viable candidate for employment in light of his lifting restriction and other non-medical factors.

d. Customer service: The Referee finds that Claimant’s preference for working alone, lack of customer service experience and inability to talk for long periods without going hoarse would preclude Claimant from jobs requiring customer service, even in the absence of his hearing impairment. As a result, Employer’s argument that Claimant could work in customer service jobs but for his hearing impairment, is rejected.

e. Local labor market: The Soda Springs local labor market boasts a lower-than-average unemployment rate but, nevertheless, further compounds Claimant’s job search difficulties. Given the state of the national economy, more outside-area applicants are vying for fewer jobs because there is less voluntary turnover. Mr. Jordan reported that the types of jobs available in Soda Springs in November 2009 were: Autobody Repairer, Sheepherder, Food Safety Maintenance Supervisor, Electrician, Human Resource Administrator, Cashier, Food Service Manager and Janitor, in addition to some other part-time positions, and that Claimant was either unqualified or unable to perform any of them. Dr. Collins reported some vague details about a job listing for a position involving “setting up a store” that Claimant may have been able to do. However, Dr. Collins was unable to discern much information from the ad, like the physical requirements for the job and whether it was full-time and permanent. Therefore, this evidence is insufficient

to establish that the position in question was a realistic employment opportunity for Claimant. Further, even though Claimant was highly motivated to find work, he eventually gave up seriously looking due to the lack of positive response he received from the approximately 20 applications that he submitted.

23. The Referee finds that Claimant would be totally and permanently disabled, even in the absence of his preexisting permanent physical impairments. His nonmedical factors, combined with his 5-pound lifting restriction stemming from his cervical injury, render him totally and permanently disabled. As a result, ISIF is not liable for any portion of Claimant's benefits.

CONCLUSIONS OF LAW

1. Claimant has proven that he is totally and permanently disabled.
2. ISIF is not liable for Claimant's benefits and the Complaint against it should be dismissed with prejudice.
3. All other issues are moot.

RECOMMENDATION

Based upon the foregoing Findings of Fact, Conclusions of Law, and Recommendation, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

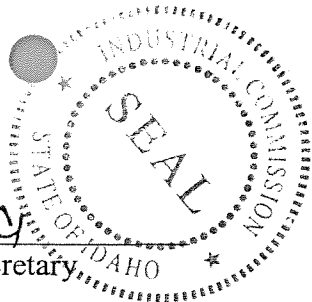
DATED this 10th day of June, 2010.

INDUSTRIAL COMMISSION


Michael E. Powers, Referee

ATTEST:

Gina Espinoza
Assistant Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of June, 2010, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

FRED J LEWIS
PO BOX 1391
POCATELLO ID 83204-1391

WES L SCRIVNER
PO BOX 27
BOISE ID 83707

LAWRENCE E KIRKENDALL
2995 N COLE RD STE 260
BOISE ID 83706

ge

Gina Espinoza

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID TARBET,)
)
Claimant,)
)
v.)
)
J. R. SIMPLOT COMPANY,)
)
Self-Insured Employer,)
)
and)
)
STATE OF IDAHO, INDUSTRIAL)
SPECIAL INDEMNITY FUND,)
)
Defendants.)
_____)

FILED
JUN 14 2010
INDUSTRIAL COMMISSION
IC 2007-012004
2007-038938
ORDER

Pursuant to Idaho Code § 72-717, Referee Michael E. Powers submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendation of the Referee. The Commission concurs with this recommendation. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

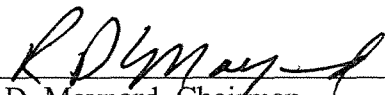
Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

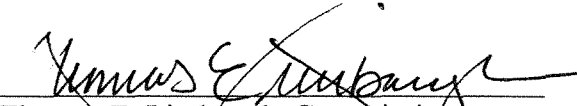
1. Claimant has proven that he is totally and permanently disabled.
2. ISIF is not liable for Claimant's benefits and the Complaint against it is dismissed with prejudice.
3. All other issues are moot.


4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 14th day of June, 2010.

INDUSTRIAL COMMISSION


R.D. Maynard, Chairman


Thomas E. Limbaugh, Commissioner


Thomas P. Baskin, Commissioner

ATTEST:


Assistant Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of June 2010, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

FRED J LEWIS
PO BOX 1391
POCATELLO ID 83204-1391

WES L SCRIVNER
PO BOX 27
BOISE ID 83707

LAWRENCE E KIRKENDALL
2995 N COLE RD STE 260
BOISE ID 83706

ge



WES L. SCRIVNER
Attorney at Law
Post Office Box 27
Boise, Idaho 83707
Telephone: (208) 389-7314
Facsimile: (208)389-7464
Idaho State Bar No. 2306

2010 JUL - 11 P 4: 16
RECEIVED
INDUSTRIAL COMMISSION

Attorney for Employer

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

DAVID TARBET,

Claimant,

vs.

J.R. SIMPLOT COMPANY,

Self-Insured
Employer,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND

Defendants.

I.C. Nos. 2007-012004
2007-038938

**EMPLOYER'S MOTION FOR
RECONSIDERATION**

COMES NOW the above named Defendant J. R. Simplot Company, by and through its counsel of record, Wes L. Scrivner, pursuant to I.C. § 72-718 and JRP 3, and moves this honorable Commission to reconsider its Findings of Facts, Conclusions of Law, and Recommendation dated June 14, 2010.

This motion is supported by the memorandum filed concurrently herewith.

DATED this 1st day of July, 2010.

J.R. SIMPLOT COMPANY

By: 
Wes L. Scrivner
Attorney for Employer

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Fred J. Lewis
Racine, Olson, Nye, Budge & Bailey, Chtd.
P. O. Box 1391
Pocatello, ID 83204-1391

☒ HAND DELIVERY
☐ U.S. MAIL
☐ OVERNIGHT MAIL
☐ FAX

Lawrence E. Kirkendall
Kirkendall Law Office, Chartered
2995 North Cole Road, Suite 260
Boise, ID 83704

☒ HAND DELIVERY
☐ U.S. MAIL
☐ OVERNIGHT MAIL
☐ FAX


WES L. SCRIVNER

WES L. SCRIVNER
Attorney at Law
Post Office Box 27
Boise, Idaho 83707
Telephone: (208) 389-7314
Facsimile: (208)389-7464
Idaho State Bar No. 2306

2010 JUL - 11 P 4: 16
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Attorney for Employer

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

DAVID TARBET,

Claimant,

vs.

J.R. SIMPLOT COMPANY,

Self-Insured
Employer,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND

Defendants.

I.C. Nos. 2007-012004
2007-038938

**EMPLOYER'S MEMORANDUM
IN SUPPORT OF MOTION FOR
RECONSIDERATION**

INTRODUCTION

Pursuant to Idaho Code § 72-718 Defendant J. R. Simplot Company ("Simplot") moves the Commission for its order reconsidering its previous decision and revising the Findings of Fact, Conclusions of Law, and Recommendation filed June 14, 2010 (hereinafter referred to as "the decision"). The Industrial Commission's decision finding that the Industrial Special Indemnity Fund ("ISIF") has no liability to Claimant is not supported by substantial competent evidence as required by Idaho Worker's

Compensation Laws. The Commission simply states conclusions without citing any basis as to how those conclusions were reached, and does not comply with the Idaho Supreme Court's mandate that the Commission set forth a basis for reaching its decisions.

Furthermore, the Industrial Commission decision rests almost entirely on the opinion of William Jordan ("Jordan"), the vocational expert called by ISIF. Jordan's opinion is premised on a fundamental misapplication of Idaho Code § 72-332: Jordan proceeds on the assumption that because Claimant was employed, and able to function in a modified form of his job, that his pre-existing physical impairments do not constitute a hindrance to his employment. This ignores Idaho Code § 72-332, and ignores the substantial evidence in this case. Jordan then compounds his error by reciting that Claimant would be totally and permanently disabled with this five pound lifting restriction despite the overwhelming evidence that Claimant and Simplot accommodated his restrictions prior to his most recent injury. Jordan neither explains, nor addresses this evidence. The Industrial Commission, by adopting Jordan's opinion, adopts his error as its own. The evidence shows that Claimant was significantly limited before his most recent accident. This decision does not set forth the Commission's reasoning for: 1) for adopting Jordan's opinion; 2) ignoring the mandates of Idaho Code § 72-332; and 3) rejecting the testimony of Claimant, his supervisor Gary Norman, and Nancy Collins, Ph.D. The decision clearly falls short of the standard of the Supreme Court imposed upon the Commission in *Nenoff v. Culligan Soft Water*, 95 Idaho 834, 521 P.2d 658 (1974) and in *Ellison v. Bunker Hill Company*, 96 Idaho 317, 528 P.2d 199 (1974). For

these reasons, Simplot requests that the Industrial Commission reconsider its finding that ISIF is not liable for any portion of Claimant's total disability.

STANDARD OF REVIEW

The standard of review for reconsideration under Idaho Code § 72-218 is similar to the one used by the Idaho Supreme Court in reviewing decisions of the Industrial Commission. Pursuant to Idaho Code § 72-732, the Idaho Supreme Court may set aside Industrial Commission decisions on the following grounds:

1. the findings of fact are not based on substantial competent evidence;
2. the commission has acted without jurisdiction;
3. the decision was procured by fraud or;
4. the findings of fact do not as a matter of law support the order or award.

The Industrial Commission, as the ultimate arbiter, may also exercise free review over the referee's finding of facts and is not required to accept them. In order to discharge its responsibility, the Idaho Supreme Court has ruled that the decisions of the Industrial Commission must be based on findings of fact that are definite, certain and specific, and that there should be no room for misunderstanding as to whether statements are intended to be findings. In *Nenoff v. Culligan Soft Water*, 95 Idaho 834, 521 P2d 658 (1974) the Idaho Supreme Court considered an appeal from the Industrial Commission which reversed the decision of an appeals examiner that Claimant was eligible for unemployment benefits. The Industrial Commission entered an order after hearing and determined that the appellant voluntarily left his employment without good cause and thus was not eligible for unemployment benefits. The Idaho Supreme Court began its discussion by noting that its review was limited to questions of law. However, the Court noted that it was impossible to fairly evaluate a conclusion of the law of the Industrial

Commission without knowing the facts upon which the Commission based its conclusion. In *Nenoff*, the Court held:

The findings of fact entered by the Commission are merely a recitation of the allegations, contentions and testimony of the parties. Such findings of fact do not permit this Court to obtain a clear understanding of the basis of the decision of [***4] the Commission and are contrary to this Court's instructions in *Swan v. Williamson, supra*, wherein we stated:

[HSN2] "Where there is a conflict in the testimony the duty rests upon the board, a fact finding body, to resolve such conflict, to determine what is true and what is false and to announce the facts in accordance [*837] [**661] with its findings. Statements, observations, recitals and excerpts from the testimony of witnesses, argumentative comment thereon, statements of the method of reasoning by which a conclusion is reached, that the claimant has or has not established certain facts by a preponderance of the evidence, as well as statements as to sustaining or failing to sustain the burden of proof are not proper, neither are they required by nor sufficient to satisfy the express statutory duty requiring specific, certain and reasonably concise findings of fact." 74 Idaho at 37, 257 p.2d at 554.

(emphasis added). 95 Idaho at 836-37. In *Ellison v. Bunker Hill Company*, 96 Idaho 317, 528 P.2d 199 (1974) the Idaho Supreme Court cited to *Nenoff* in reversing the decision of the Industrial Commission denying compensation. The *Ellison* decision is noteworthy because the Idaho Supreme Court found that the Commission's findings of fact are merely "a recitation of the allegations, contentions and testimony of the parties." Citing *Nenoff*, the Idaho Supreme Court then attaches as a lengthy footnote the entire decision of the Industrial Commission without further comment. The *Ellison* decision bears a striking resemblance to the instant case. The Industrial Commission in *Ellison* simply recited the findings of the various doctors who testified in the case (Dr.

Whitehouse, Dr. Powell and Dr. Brockley). The Industrial Commission noted the disagreement as between the opinions of the doctors, but provided no analysis or cited to any significant evidence in reaching its conclusion that Claimant had failed to prove by a preponderance of the evidence that he was disabled due to cirrhosis (a copy of the decision is attached).

The analysis done by the Idaho Supreme Court in *Ellison* and *Nenoff* applies in this case. The conclusion that Claimant is totally and permanently disabled based solely on his five pound lifting restriction and without reference to his pre-existing physical impairments is conclusory and without foundation in the evidence. The decision simply repeats Jordan's opinion without providing any analysis and is as conclusory as the decisions rendered in *Nenoff* and *Ellison*. For these reasons, the Industrial Commission should enter an order reconsidering its decision and reversing the finding that the ISIF is not liable for any portion of Claimant's benefits.

THE OPINION OF WILLIAM JORDAN IS NOT SUPPORTED BY THE RECORD

The Referee appears to rely heavily on the opinion of William Jordan, the ISIF's vocational expert. Jordan's opinion is not credible and should not be relied on. First of all, Jordan makes a statement which is preposterous given the evidence:

A. I didn't believe that the previous impairments, including the low back, the knee, and hearing from industrial injuries constituted hindrances to his employability.

(Jordan Depo., p. 7). While Jordan later amends this remark, it actually raises an issue regarding his credibility. The vast bulk of Claimant's testimony shows that his pre-existing physical impairments were a hindrance to his employment. Without exhausting all of the different ways that his impairments were a hindrance, a cursory review of the evidence shows the following: 1) he had to use duct tape on his hands to perform his

job (Ex. 19, p. 28); 2) he not only changed the way he worked due to his back problems, but he also needed help performing his work (Ex. 19, p. 41-42); 3) he took narcotics daily for the years following his lumbar injury up until the time of his most recent accident (Ex. 20, p. 78); 4) he manufactured specialized tools that allowed him to perform his job (Hrg. Tr., p. 87-90); 5) his hearing problems, which became progressively worse, prevented him from hearing the safety instructions or getting work assignments (Ex. 19, p. 51-53); his hearing problems were not only a work problem but a problem "even out in life" (Ex. 19, p. 54); and 6) his rheumatoid arthritis was a hindrance to his performing almost all aspects of his job but he persisted. (Ex. 20, p. 16). Following Claimant's return to work after his 2001 lumbar injury, he did not resume his heavy job as a maintenance worker, but instead changed to an operator job which would be better for his back. (Hrg. Tr., p. 51-52, 65, 141; Ex. 20, p.31-32). His 2001 accident not only caused him to be off work for over a year, but required him to take pain medication daily, which he still does. (Hrg. Tr., p. 53-55, 65). As noted, Jordan expanded his statement but his preliminary assessment of the situation should be noted by the Commission as it bears on his credibility.

More importantly, Jordan appears to have either misunderstood or been unaware of the fact that Idaho Code § 72-332 mandates that:

the mere fact that a claimant is employed at the time of the subsequent injury shall not create a presumption that the pre-existing permanent physical impairment was not of such seriousness as to constitute such hindrance or obstacle to obtaining employment.

Idaho Code § 72-332 (2). Leaving aside that Jordan's testimony shows him to be more of an advocate than a credible expert, it is clear that Jordan relied heavily on the fact that Claimant was able to continue employment at Simplot. It appears Jordan allowed

that fact to significantly and inappropriately impact his opinion contrary to Idaho Code § 72-332. When asked about the basis for his opinion, Jordan recites that in addition to Claimant's education and skills, he looked at "really what he's done over the course of 36 years for his work history at Simplot." (Jordan Depo., p. 6). When asked about Claimant's restrictions as it affected his employability, Jordan states:

So there is a number of different restrictions there. But it all boiled down to that the claimant returned to his work, and was able to perform the work successfully for over a period of five years. So he certainly had a back difficulty, had surgery for it. And then was able to return to work, and do it, do the job, heavy labor.

(Jordan Depo., p. 16) (emphasis added). The clear inference from Jordan's statement that it "all boiled down" to Claimant's ability to perform his work shows that Jordan has adopted a presumption that Claimant's physical restrictions were not a hindrance or obstacle to obtaining employment. This is not only contrary to Claimant's testimony, but also contrary to the testimony given by his supervisor, Gary Norman. Mr. Norman testified that Claimant was accommodated in the wrenches that he was required/allowed to use (Tr., p. 138); he was given assistance with some of his work activities (Tr., p. 141); he had limitations which required accommodations due to his back (Tr., p. 142); and his hearing problems made it difficult for management to communicate to Claimant the requirements of the job and safety instructions (Tr., p. 145). Jordan apparently overlooks this when he describes Claimant's work as "heavy labor"; indeed the labor was heavy, but Claimant benefitted from significant accommodations at all times and places during the course of his work due to his pre-existing physical impairments. With respect to Claimant's rheumatoid arthritis, Jordan again appears to place great

emphasis on Claimant's return to "full" duty, disregarding the fact that Claimant accommodated his condition at all times:

A. He was aware of the RA, and treated for it since 1984, as I recollect. So he did know that it was a problem for him. But as you said, he was able to do his full job as full duty.

(Jordan Depo., p. 19-20) (emphasis added). Finally, Jordan states in his report that Claimant's "low back and his hearing will [sic] not manifest, and were not hindrances to his employment." (Jordan Depo., p. 20). When asked about this in his deposition, Jordan opines more as an advocate than as an expert and also ignores the dictates of Idaho Code § 72-332 with respect to Claimant's employment:

A. No, I'm not saying he wasn't aware of it. I'm not a lawyer, and I know that you have a certain definition for that as a rehab guy. I looked up what manifest was in the dictionary. And it talked about readily perceived by the senses, by the sight, easily understood or recognized by the mind, evident.

And as I looked [sic] at that, I looked at it as a practical matter in that he was employed despite the back difficulties, despite the hearing problems, despite the PTSD. He was able to keep his job and earn wages, and return to work after each of these conditions, and with these conditions. So it wasn't taking him out of the job market.

(Jordan Depo., p. 20-21) (emphasis added). Jordan also appears to underestimate the nature and significance of the accommodations made for Claimant:

A. Right. I don't think he asked for formal reasonable accommodations. I just think he had a good supervisor that understood he was part of the aging workforce, and was going to help him. I mean, no employer wants to have additional injuries or accidents. So I thought they had a good working relationship. So they did what they could to keep him going.

(Jordan Depo., p. 22) (emphasis added). Claimant was very clear in two depositions and his hearing testimony that he was able to do his job with significant help and

adjustments. Jordan recites that he “didn’t see there were any performance problems”; this appears to overlook the fact that Claimant was given serious accommodations, received assistance and would “come and ask for help with some things.” (Tr., p. 138).

Idaho Code § 72-332 explicitly states that the fact that Claimant is employed at the time of the subsequent injury shall not create a presumption that he did not have an impairment that constituted a hindrance and obstacle to his employment. It is not only clear in the instant case that Claimant’s physical restrictions were a hindrance, but that Jordan ignored them and relied heavily on the fact that Claimant had been employed for 36 years. Jordan’s testimony is simply not credible on this point.

With respect to whether Claimant would be totally and permanently disabled as a result of his five pound lifting restriction alone, Jordan is even more conclusory than he is on the hindrance issue. Jordan recites that Dr. Blair’s lifting restriction alone basically made Claimant totally and permanently disabled without reference to accommodation with his other restrictions:

A. No, I don’t think they need to be combined. I think that the cervical injury really solely took him out of the labor market. Again, it took him out of his customary work. And there is nothing from the transferable skills level that we could see that would help him in getting back to work in a different capacity.

(Jordan Depo., p. 8). Jordan’s reference to customary work is revealing and shows the disproportionate emphasis on Claimant’s Simplot employment. Jordan’s entire testimony on the combination issue, and thus the Commission’s decision, rests on Dr. Blair’s brief letter of August 17, 2009. Ex. 14, p. 157. In that letter, Dr. Blair notes that Claimant had significant pre-existing restrictions due to his back injuries. He also notes that Claimant had significant lifting restrictions due to his back injuries. Dr. Blair states:

Certainly, there were preexisting lifting limitations due to lumbar spine. However, I believe these current restrictions supersede his previous lumbar restrictions, as far as lifting is concerned, due to the fact that they are more restrictive.

(Id.) This cursory statement by Dr. Blair forms the basis of the entire decision of the Industrial Commission. It is not clear what Dr. Blair means by "supersede"; if he means that the most recent accident aggravated the previous lifting restriction or increased the restrictions, then under Idaho Code § 72-332 the ISIF is liable. The Industrial Commission appears to view Dr. Blair's lifting restrictions due to the cervical spine separate from the ones due to his lumbar injury; however, it is not apparent that Dr. Blair had done so. He is simply stating that the restrictions from the neck injury exceed the lumbar restrictions.

The Commission's reliance on Jordan's evidence and the brief reference by Dr. Blair is misplaced. The bulk of Jordan's testimony and his report focus on the fact that Claimant was able to perform his job prior to his more recent accidents overlooking the serious accommodations and stoic efforts of Claimant to stay employed. Dr. Blair's cursory reference to lifting restrictions being "more restrictive" begs the question as to whether the restrictions are in fact new ones or exacerbations of ones previously had. Indeed, Dr. Walker noted the interplay between lifting restrictions due to neck injuries and those from lumbar injuries. As Dr. Walker testified:

Q. Does that make sense and is that consistent with what

—

A. It does. Sometimes I won't put that much limitation on a neck just because with the cervical procedure patients, you know, load their low back when they lift more so than loading with their neck.

And so, you know, he again did the surgery. I never disagree with the surgeon if they - - or they go in there and

they feel there's no reason to limit lifting on their neck, then I **would** never disagree with that.

But, again, having lifting limitations is more commonly seen with the low back just because the weight when it's in your arms loads the lumbar more than the neck.

(Walker Depo., p. 19-20) (emphasis added).

The Industrial Commission is the ultimate arbiter of facts and can review the evidence in this case *de novo*. It is not required to accept the referee's findings; indeed, it is charged with ensuring that those findings are supported by the evidence in the record. Claimant was allowed to work at Simplot despite injuries and limitations that would have prevented him from doing so in the absence of his near-heroic efforts and Simplot's stalwart encouragement and assistance. It is simply unfair to have the entire liability for Claimant's total permanent disability devolve onto Simplot, which endeavored at all times to accommodate this significantly limited individual. A finding that Simplot alone is liable for the total and permanent liability in the instant case violates the letter and spirit of the ISIF statute and is not in keeping with the liberal construction to be given the Idaho Worker's Compensation laws. The intent and purpose of the statute is to encourage employers to hire individuals with disabilities or to retain those who have been injured on the job.

The purpose of second injury funds such as I.C. § 72-332 is to encourage employers to hire partially incapacitated persons and to encourage partially incapacitated persons to seek employment.

Curtis v. Shoshone County Sheriff's Office, 102 Idaho 300, at 304, 629 P.2d 696, at 700 (1981). The decision in the instant case does a disservice to those goals.

THE TESTIMONY OF DR. COLLINS IS MORE CREDIBLE

The Industrial Commission decision pays only casual references to the report and testimony of Nancy Collins, PhD, and does not set forth the reasoning that led the Commission to dismiss her opinion. Simplot submits that Dr. Collins' evidence, which is uncontroverted, and in accordance with Idaho law, establishes that the combination of Claimant's pre-existing physical limitations and his industrial accident rendered him totally and permanently disabled. Unlike the testimony of Jordan, Dr. Collins' evidence is amply supported by the record with specific references to the facts which support her opinion.

Dr. Collins testified that Claimant's pre-existing physical limitations concerned the lumbar area, hearing, vestibular balance issues and rheumatoid arthritis. (Collins Depo., p. 7-8). She also noted that his post-traumatic stress disorder (PTSD), while manageable, was also a factor in his employability. (Collins Depo., p. 22). She further testified that with the cervical restrictions alone, Claimant would have had access to light sedentary work:

A. Well, I don't. I still think that there is still a small part of the labor market that Mr. Tarbet would have had access to, considering, you know, some light work and sedentary work.

A lot of the customer service - - a lot of the jobs that have high turnover: working in fast food, in customer service, as a cashier, say, at a convenience store, or service writer. Mr. Jordan actually lists some jobs in his report that he had discussed with the psychologist at the VA. And that that doctor had said that it would be okay for him to do those kinds of jobs based on his PTSD.

I think those jobs would have been available to him with his cervical restrictions. But I think his hearing deficit really would make those jobs very

difficult, because they do require the ability to hear someone speak, ask questions, talk on the phone and Mr. Tarbet would have a hard time doing that.

(Collins Depo., p. 25) (emphasis added). Dr. Collins testified that she found a job in Soda Springs that fit Claimant's lifting limitation from his cervical injury but was precluded because of his back problems:

I actually saw a job in Soda Springs yesterday that required lifting five to ten pounds, and required frequent stooping, crouching, crawling, the other activities that he can no longer do. So it would impact him somewhat.

(Collins Depo., p. 26). Dr. Collins described the combined effects of Claimant's pre-existing restrictions and those restrictions for his cervical injuries:

A. I think it is a combination, because those jobs that he would be able to do with his cervical injury, are really eliminated by his other preexisting restrictions or limitations. Primarily, the hearing deficit, but also, the positional limitations that he has to the low back. The no prolonged sitting, standing, walking. Some of the bending, climbing, those activities would limit him even further.

And he has a fairly small piece of the pie to begin with. We have a limited labor market in Soda Springs. If he could include Pocatello, it would be somewhat better. But with the other restrictions he has, in addition to the cervical, those lifting restrictions, I think he would have a very difficult time finding work.

(Collins Depo., p. 27-28) (emphasis added). Dr. Collins testified that Dr. Blair's limitation of five pounds frequently and ten pounds occasionally placed Claimant in the light to sedentary category but that there would still be jobs for him. (Collins Depo., p. 32). However, Claimant's other restrictions (mostly due to his back and also due to his hearing) would preclude him from doing the majority of sedentary jobs:

If, for example, he, you know, had an opportunity to work as a service write for an automobile place, you know, hearing

would be very important for that job. It would fit with most of his other descriptions. But he would not be able to do the job adequately without talking on the telephone and working with customers.

You know working as a hotel desk clerk, something like that, you really have to be able to hear the customers, and be able to speak on the telephone. And I think those are the kinds of jobs his hearing would really impact.

(Collins Depo., p. 35) (emphasis added). With respect to production or assembly line jobs, Claimant could do it within his lifting restrictions (cervical) but not within his bending limitations for his back. (Collins Depo., p. 35-36). Employer Ex. 6, p. 6. Dr. Collins testified that Claimant's hearing limitations would prevent other types of service work:

But as I understand it, my understanding is it's your opinion he should avoid customer service type jobs, telephone work, and that type of thing, because of his poor hearing?

A. Yes.

Q. And that's something that preexisted the last industrial accident?

A. Yes.

Q. Would he be able to work as a waiter in a restaurant?

A. I think it would be difficult. I mean, he would have to ask multiple times what they were ordering. I think if you are not looking right at him, or you are not talking in his good ear, he doesn't hear you.

(Collins Depo., p. 42) (emphasis added). Claimant could probably do driving jobs and equipment operations with only his hearing limitations, but his other problems preclude him from doing that type of work. (Collins Depo., p. 43-44). Dr. Collins testified that Claimant's back restrictions with regard to squatting, crawling, kneeling, ladder use, position rotation, forward bending would preclude him from doing the physical types of work as laborer in a mine or in a hospital. (Collins Depo., p. 52-53). Dr. Collins

elaborated on the specific job she found in Soda Springs that, but for Claimant's back problems and limitations, he would have been able to do:

And it was the one that required lifting five to ten pounds. But it also required the employee to be able to frequently stand, walk, stoop, bend, crouch, balance, use fingers, hands. So it was really not available to him. And that appeared to be certainly a combination issue. You would have to be diligent in your job search.

(Collins Depo., p. 54, (emphasis added). The fact that Dr. Collins could find a specific job that was within Claimant's cervical restrictions proves that it is a combination of the two sets of limitations (those pre-existing the April 2007 cervical injury and those following it) that create the total permanent disability. Dr. Blair's restriction places him in the sedentary category; his other pre-existing conditions preclude him from that work.

As Dr. Collins elaborated:

Q. If we took just Dr. Blair's restrictions, isn't it true that Mr. Tarbet would have access to less than sedentary work, the restrictions provided in regards to his neck, lifting restrictions?

A. Well, Blair's restrictions are - - his lifting restrictions would be sedentary. It's up to ten pounds is sedentary work. Again, as I was explaining earlier, I think there are light jobs that don't require lifting over ten pounds, but do require standing and walking more than two-thirds of the day, or up to two-thirds. So that would take him out of sedentary. So I think his labor market is fairly small in that he has access to sedentary and some light jobs.

(Collins Depo., p. 56-57) (emphasis added). As Dr. Collins noted, the lifting restrictions alone would not preclude Claimant from light sedentary work. However, when combined with his back restrictions, Claimant is unable to perform a majority of those jobs:

Q. So based on lifting restrictions, that's where you get the light, sedentary type jobs based on the lifting limitation of five pounds?

A. Right. But if you had a job that required lifting of ten pounds, but also required a significant amount of walking, or standing, it would still be a light job, as opposed to a sedentary job.

(Collins Depo., p. 57). With respect to the job he was doing at Simplot, Dr. Collins testified he could perform that work with the lifting restriction only but that the remaining restrictions would prevent it:

A. Well, that some of the tasks he performed in his jobs would be available to him. Like the operations job he had at the time that he left Simplot, he would be able to do the part where he was just programming the computer, or watching the computer, or, you know, oiling things, maybe. But he wouldn't be able to do the part where he had to actually repair equipment, or keep it running.

Q. Would that be due to the limitations and restrictions from his back?

A. I think it would be all of the above. I think it would be the bending, lifting, stooping, standing, squatting, and all those physical demands.

(Collins Depo., p. 58-59) (emphasis added).

It is clear from a review of the record that Dr. Collins' report is substantially more credible than Jordan's. She identified a job in Soda Springs that Claimant could do within his cervical lifting restrictions. This job would be available to Claimant within his lifting restrictions and despite his non-medical factors. However, the physical requirements of stooping and bending and the other vocational limitations due to his back would prevent him from performing this job. Dr. Collins cites to specific facts in the record rather than making the conclusory statements that Jordan makes. The instant decision rests almost entirely on Jordan's pronouncement. The Industrial Commission finding that Claimant is totally and permanently disabled is a result of his cervical limitations alone is simply not supported by the record.

The Industrial Commission should reconsider its decision and enter an order finding that the ISIF is liable for a portion of Claimant's benefits. The pre-existing permanent physical impairments that were given include Claimant's 8% for hearing, 10% for vestibular impairment and 10% for his low back condition. Simplot also submits that the Industrial Commission should find that Claimant's rheumatoid arthritis constitutes a pre-existing permanent physical impairment, assign a rating to it and apply it to the ISIF under the *Carey* formula.

THE DISCUSSION OF LAW CITED IN THE DECISION IS NOT GERMANE TO ANY ISSUES IN THE CASE

At page 10 of its decision, the Industrial Commission recites basic worker's compensation law that the law is to be liberally construed in favor of the employee, that there is no room for narrow technical construction, and that the Commission is not required to construe facts liberally in favor of the worker. Given the fact that the only issue in the case was the liability as between Simplot and the ISIF, the recitation of this case law is extremely puzzling. There are only two possible explanations: (a) either the Industrial Commission considered that its decision would somehow adversely affect Claimant; or (2) the language is mere surplusage. In either case, the discussion does not have any bearing on any of the issues in the case and its inclusion supports Simplot's position that the decision must be reconsidered.

CONCLUSION

The findings of the Industrial Commission in this decision are conclusory, without foundation, and do not comport with the requirements for decisions as set forth by the Idaho Supreme Court. The finding that the ISIF has no liability is not only contrary to the record but violates the letter and spirit of Idaho Code § 72-332. Simplot respectfully

urges the Industrial Commission to reconsider and reverse this finding and appropriately apportion the liability for Claimant's benefits consistent with the record in this case.

DATED this 1st day of July, 2010.

J.R. SIMPLOT COMPANY

By: 

Wes L. Scrivner
Attorney for Employer

CERTIFICATE OF SERVICE

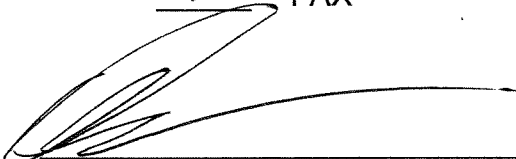
I hereby certify that on this 1st day of July, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Fred J. Lewis
Racine, Olson, Nye, Budge & Bailey, Chtd.
P. O. Box 1391
Pocatello, ID 83204-1391

☐ HAND DELIVERY
☒ U.S. MAIL
☐ OVERNIGHT MAIL
☐ FAX

Lawrence E. Kirkendall
Kirkendall Law Office
2995 North Cole Road, Suite 260
Boise, ID 83704

☐ HAND DELIVERY
☒ U.S. MAIL
☐ OVERNIGHT MAIL
☐ FAX


WES L. SCRIVNER

Ellison, Ralph

SCI IIC 0105

This decision STARTS at: 96 Idaho 317

SC No. 11567

IN THE SUPREME COURT OF THE STATE OF IDAHO

Ralph Ellison, Claimant-Appellant
The Bunker Hill Co., Self-Insured Employer/Defendant-Respondent
11/15/1974
No. 11567

Cited as: Ellison v. Bunker Hill Co., 96 Idaho 317, 528 P.2d 199 (1974)

Frank H. Powell, Coeur D'Alene, for claimant-appellant.

James P. Keane of Brown, Peacock, Keane & Boyd, Kellogg, for defendant-respondent.

DONALDSON, Justice.

This appeal places in issue the sufficiency of the findings of fact and conclusions of law entered by the Industrial Commission of the State of Idaho in the application of Ralph Ellison, the appellant. For the reasons stated in this opinion, the Order of the Industrial Commission is reversed and remanded.

The appellant worked underground at Bunker Hill continuously from 1955 to 1969. In 1969 he began working at the smelter. His employment immediately prior to 1955 consisted of fourteen years as a salesman. He was continuously exposed to hardrock dust while working underground. His only other exposure to such dust was for three days, occurring thirty-one years before. The appellant claims that as of August 15, 1971, he has been totally disabled as a result of silicosis caused by his employment at Bunker Hill.

Upon appellant's application for workmen's compensation, the Industrial Commission held the necessary hearing. The Commission entered findings of fact¹ and a conclusion of law² leading to the Order that the application for compensation be dismissed. From that Order this appeal is taken.

¹ "FINDINGS OF FACT

"I

"The claimant, who was born [REDACTED] began his employment with the defendant, Bunker Hill Company, in the fall of 1955 as an underground miner. His principal previous occupation had been as a salesman in Missouri for approximately 14 years. He had not previously been employed in the mining industry except for a period of approximately three days prior to working for the Bunker Hill Company. The claimant was employed continuously by the Bunker Hill Company until August 1971, except for brief breaks in his employment of not to exceed two months duration, and one break of eight months during which a strike closed the mining operation. The claimant worked as an underground hard rock miner in various jobs, including miner's helper and driller, until some time in the year 1969.

(cont'd)

Ellison 2

SC1 IIC 0106

This decision STARTS at: 96 Idaho 317

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On such appeal this Court is empowered to review only questions of law. *Nenoff v. Culligan Soft Water*, 95 Idaho 834, 521 P.2d 658 (1974); *Madron v. Green Giant Co.*, 94 Idaho 747, 497 P.2d 1048 (1972). However, as we stated in *Nenoff*, such review is impossible when the Industrial Commission fails in its function as factfinder. Here, as in *Nenoff*, the Commission's findings of fact are merely "a recitation of the allegations, contentions, and testimony of the parties." 95 Idaho 834, 836, 521 P.2d 658, 660. This failure to resolve the factual conflicts in the evidence prevents this Court from fulfilling its constitutional obligation of evaluating the conclusions of law entered by the Commission and to review the basis of the Commission's decision.

(cont'd)

"II

"The claimant began to experience symptoms of shortness of breath in the period from 1965 to 1968. During the period he worked underground, he was exposed to hard rock dust. In 1969 the claimant was transferred and worked in the smelter until August 1971. He was exposed to smoke and dust in the smelter and his symptoms of shortness of breath increased during this time. He stopped his employment in August 1971 and sought medical advice. At the time of the hearing the claimant complained of shortness of breath and much difficulty in breathing. He was unable to engage in any type of physical activity and was unable to walk for any distance greater than two blocks.

"III

"The claimant's application for hearing requests that he be awarded compensation for occupational disease, specifically for silicosis, which he alleges he contracted during his years of employment with the Bunker Hill Company. The defendant denies that the claimant is suffering from silicosis.

"IV

"In support of his claim for benefits the claimant presented the testimony of Dr. Alan Coombs Whitehouse, a specialist in pulmonary diseases, of Spokane, Washington. Dr. Whitehouse first examined the claimant in November 1971 at the time the claimant complained of shortness of breath on exertion, pain in his chest which increased by deep breathing, inability to engage in physical activity such as climbing stairs, and a loss of sixteen pounds in weight. The examination of Dr. Whitehouse included a physical examination, x-rays, lung function tests, and lung diffusion studies. Dr. Whitehouse testified that the x-rays taken at this time showed evidence of calcification in the lungs which was indicative of Stage II silicosis. The lung diffusion studies also showed abnormal findings which would be present in diffuse lung diseases such as silicosis. In Dr. Whitehouse's opinion the claimant had silicosis and some mild emphysema. A tuberculosis test was positive, although the claimant did not have active tuberculosis at that time. Dr. Whitehouse stated that the test indicated the claimant had some exposure at some time to tuberculosis and is a high risk to that disease. The doctor's diagnosis of silicosis was made primarily by examination of x-rays and the history of the claimant's exposure to silica dust during a lengthy period of underground mining and the lung diffusion studies which had been performed under his direction.

(cont'd)

Ellison 3

SC1 IIC 0107

This decision STARTS at: 96 Idaho 317

SC No. 11567

Therefore the Order is reversed, and the matter remanded to the Commission for additional proceedings and either party may petition the Commission to reopen the case and to submit additional evidence. Costs to appellant.

SHEPARD, C. J., and McQUADE, McFADDEN and BAKES, JJ., concur.

(cont'd)

"V

"The defendants presented the testimony of two physicians. Dr. Marvin L. Powell, a specialist in internal medicine, examined the claimant in December 1972. Dr. Powell had the benefit of reviewing x-rays taken of the claimant in 1955, 1957 and 1960 during employment physicals while the claimant was working for the Bunker Hill Company, and he also reviewed recent x-rays of the claimant. Dr. Powell testified that the x-rays taken in 1972 showed considerable calcium deposits in the lungs and an increase in air space in the lungs, which would indicate emphysema. The x-rays presented a picture of a fibrocalcific disease. In comparing this x-ray with earlier x-rays of the claimant's chest from 1955 through 1960, the doctor indicated that the x-rays showed no change in the calcification of the lungs during this period of time and that calcification had been present as early as 1955. However, the x-rays did show considerable increase in the air space in the lungs from 1955 to 1972. In the doctor's opinion the x-rays showed no change in any fibrocalcific disease from 1955 to 1972. The claimant had, however, developed considerable symptoms of emphysema during this period of time. In the doctor's opinion the claimant was not suffering from silicosis since there had been no increase in the calcification during the period of the claimant's employment in underground mining. In his opinion the calcification was the result of tuberculosis, and no silicosis.

"VI

"Dr. John Brockley, a radiologist, also testified on behalf of the defendants. His testimony was similar to that presented by Dr. Powell in his interpretation of the series of x-rays. In Dr. Brockley's opinion the x-rays disclosed no change in the calcification present in the claimant's lungs from 1955 to 1972. The x-rays, however, disclosed considerable increase in the evidence of emphysema. Dr. Brockley did not interpret the x-rays as showing any evidence of eggshell calcification, the presence of which indicates silicosis, although Dr. Whitehouse had indicated that he saw some evidence of this in the x-ray he had examined in 1971. In Dr. Brockley's opinion the claimant was not suffering from silicosis."

² "CONCLUSIONS OF LAW

"I

"The Industrial Commission concludes that the claimant has failed to prove by a preponderance of the evidence that he is disabled by silicosis or that he is entitled to compensation under the provisions of the occupational disease compensation law."

ORIGINAL

Lawrence E. Kirkendall
Special Deputy Attorney General for the State of Idaho
KIRKENDALL LAW OFFICE, CHTD
2995 North Cole Road, Suite 260
Boise, ID 83704
Telephone: (208) 345-5262
Fax No: (208) 345-4859
ISB No. 3612

Attorney for Defendant, State of Idaho, Industrial Special Indemnity Fund

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID TARBET, Claimant, vs. J. R. SIMPLOT COMPANY, Employer/Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	IC Nos. 07-038938 and 07-012004 MOTION FOR ENLARGEMENT OF TIME TO RESPOND TO DEFENDANT SURETY'S MOTION TO RECONSIDER JUL 14 2007 JUL 14 2007
--	--

COMES NOW the State of Idaho, Industrial Special Indemnity Fund,

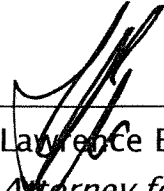
by and through its attorney of record, Lawrence E. Kirkendall, and does

hereby move this Court for an extension of time to respond to the

Defendant Surety's Motion for Reconsideration for an upon the reasons
as set forth in the Affidavit of Lawrence E. Kirkendall filed
contemporaneously herewith.

DATED this 8th day of July, 2010.

KIRKENDALL LAW OFFICES, CHTD



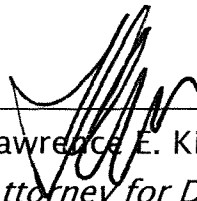
Lawrence E. Kirkendall
*Attorney for Defendant, State of Idaho,
Industrial Special Indemnity Fund*

CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that on this 8th day of July, 2010, I caused a true and correct copy of the foregoing instrument to be delivered to the following in the manner indicated below:

Fred J. Lewis Racine, Olson, Nye, Budge & Bailey 201 East Center - Center Street Plaza P.O. Box 1391 Pocatello, ID 83204 <i>Attorney for Claimant</i>	<input checked="" type="checkbox"/> (X) First Class Mail, postage prepaid <input type="checkbox"/> () Hand Delivery <input type="checkbox"/> () Overnight Mail <input type="checkbox"/> () Facsimile
Wes Scrivner J.R. Simplot Legal Department 999 Main Street, 13 th Floor P.O. Box 27 Boise, ID 83707 <i>Attorney for Employer/Surety</i>	<input checked="" type="checkbox"/> (X) First Class Mail, postage prepaid <input type="checkbox"/> () Hand Delivery <input type="checkbox"/> () Overnight Mail <input type="checkbox"/> () Facsimile

KIRKENDALL LAW OFFICES, CHTD



Lawrence E. Kirkendall
*Attorney for Defendant, State of
Idaho, Industrial Special Indemnity
Fund*

2. The Defendant Surety's Motion for Reconsideration was received by this office on Thursday, July 1, 2010, at 3:45 p.m. At the my office received the facsimile transmission, I had already left the office for the day.
3. That I had a previously scheduled vacation for Friday, July 2, 2010 and for Tuesday, July 6, 2010; basically, taking an additional day on each side of the three-day Fourth of July holiday to create a five day vacation.
4. I did not get my first opportunity to review the Claimant's Motion for Reconsideration until Wednesday, July 7, 2010.
5. The Judicial Rules of Procedure, Rule 3(F), provide that I have fourteen days to respond to the Defendant Surety's Motion for Reconsideration, which would make a responsive brief due on or before July 15, 2010.
6. I am a solo practitioner. Because of the previously scheduled vacation time, I respectfully request that this Court grant an enlargement of time to respond to the Motion for Reconsideration

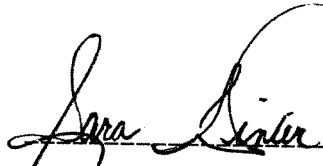
as to provide a full and fair opportunity for response, allowing for an additional seven days, or up to and including July 21, 2010, to file a responsive pleading.

7. FURTHER YOUR AFFIANT SAYETH NAUGHT.



Lawrence E. Kirkendall, Affiant

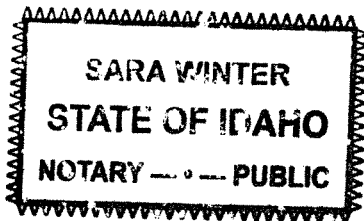
SUBSCRIBED AND SWORN TO BEFORE ME this 8 day of July, 2010.



Notary Public for Idaho

Residing at Boise

My commission expires: 5/15/12

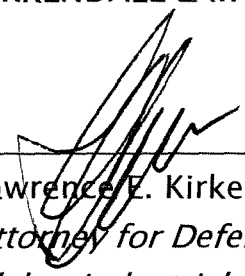


CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that on this 3rd day of July, 2010, I caused a true and correct copy of the foregoing instrument to be delivered to the following in the manner indicated below:

Fred J. Lewis Racine, Olson, Nye, Budge & Bailey 201 East Center – Center Street Plaza P.O. Box 1391 Pocatello, ID 83204 <i>Attorney for Claimant</i>	<input checked="" type="checkbox"/> First Class Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile
Wes Scrivner J.R. Simplot Legal Department 999 Main Street, 13 th Floor P.O. Box 27 Boise, ID 83707 <i>Attorney for Employer/Surety</i>	<input checked="" type="checkbox"/> First Class Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile

KIRKENDALL LAW OFFICES, CHTD



Lawrence E. Kirkendall
*Attorney for Defendant, State of
Idaho, Industrial Special Indemnity
Fund*

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID TARBET,

Claimant,

v.

J.R. SIMPLOT COMPANY,

Employer, Self-Insured,

and

STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND,

Defendants.

IC 2007-012004

IC 2007-038938

**ORDER GRANTING
EXTENSION OF TIME**

FILED

JUL 12 2010

INDUSTRIAL COMMISSION

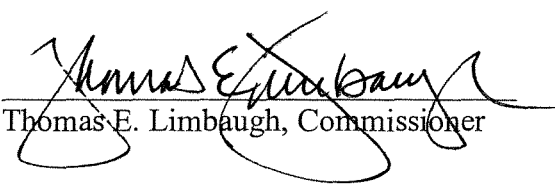
On July 9, 2010, the Industrial Special Indemnity Fund (ISIF) filed a motion requesting an extension of time to respond to Employer's motion for reconsideration. The Commission, having reviewed the motion and accompanying affidavit, finds good cause to GRANT the request.

Accordingly, IT IS HEREBY ORDERED That ISIF shall have until July 21, 2010 to respond to Employer's motion. Pursuant to J.R.P. 3(F), Employer shall thereafter have ten (10) days to reply to ISIF's response.

DATED this 12th day of July, 2010.


INDUSTRIAL COMMISSION

R.D. Maynard, Chairman


Thomas E. Limbaugh, Commissioner


Thomas P. Baskin, Commissioner

ATTEST:


Assistant Commission Secretary



CERTIFICATE OF SERVICE

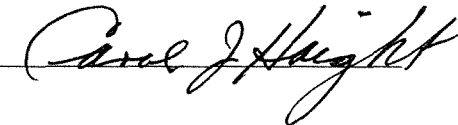
I hereby certify that on the 12th day of July, 2010, a true and correct copy of the foregoing **ORDER GRANTING EXTENSION OF TIME** was served by *Facsimile Machine Transmission* upon each of the following:

FRED J LEWIS
(208) 232-6109

WES L SCRIVNER
(208) 389-7464

LAWRENCE E KIRKENDALL
(208) 345-4859

eb/cjh



*** MULTI TX/RX REPORT ***

TX/RX NO 0404

PGS. 2

TX/RX INCOMPLETE

TRANSACTION OK

[22]912082326109

[52]93454859

[68]93897464

RACINE OLSON NYE

KIRKENDALL, L.

SCRIVNER, WES

ERROR INFORMATION

WES L. SCRIVNER
Attorney at Law
Post Office Box 27
Boise, Idaho 83707
Telephone: (208) 389-7314
Facsimile: (208)389-7464
Idaho State Bar No. 2306

Attorney for Employer

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

DAVID TARBET,

Claimant,

vs.

J.R. SIMPLOT COMPANY,

Self-Insured
Employer,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND

Defendants.

I.C. Nos. 2007-012004
2007-038938

**EMPLOYER'S RESPONSE TO
DEFENDANT'S MOTION FOR
ENLARGEMENT OF TIME**

2010 JUL 13 AM 10:46
RECEIVED
JUL 13 2010

Employer has no objection to Defendant ISIF's Motion for Enlargement of Time
to Respond to Defendant Employer's Motion to Reconsider.

DATED this 12th day of July, 2010.

J.R. SIMPLOT COMPANY

By: 

Wes L. Scrivner
Attorney for Employer

CERTIFICATE OF SERVICE

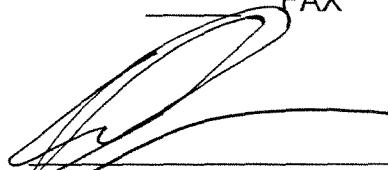
I hereby certify that on this 12th day of July, 2010, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Fred J. Lewis
Racine, Olson, Nye, Budge & Bailey, Chtd.
P. O. Box 1391
Pocatello, ID 83204-1391

☐ HAND DELIVERY
☒ U.S. MAIL
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☐ FAX

Lawrence E. Kirkendall
Kirkendall Law Office, Chartered
2995 North Cole Road, Suite 260
Boise, ID 83704

☐ HAND DELIVERY
☒ U.S. MAIL
☐ OVERNIGHT MAIL
☐ FAX


WES L. SCRIVNER

FRED J. LEWIS ISB No. 3876
 RACINE, OLSON, NYE, BUDGE
 & BAILEY, CHARTERED
 201 E. CENTER - CENTER STREET PLAZA
 P. O. BOX 1391
 POCA TELLO, ID 83204-1391
 Telephone: (208) 232-6101
 Facsimile: (208) 232-6109

Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION
 OF THE STATE OF IDAHO

DAVID TARBET,

Claimant,

v.

J. R. SIMPLOT COMPANY,

Employer/Surety

STATE OF IDAHO, INDUSTRIAL
 SPECIAL INDEMNITY FUND,

Defendants.

I.C. Nos. 2007-038938 and
 2007-012004

**CLAIMANT'S RESPONSE TO
 DEFENDANT J.R. SIMPLOT CO.'S
 MOTION FOR RECONSIDERATION**

FILED
 JUL 14 2010
 INDUSTRIAL COMMISSION

COMES NOW the Claimant, DAVID TARBET, by and through his counsel of record, Fred J. Lewis, pursuant to Idaho Code § 72-718 and Rule 3(f) of the Judicial Rules of Practice and Procedure under the Idaho Workers Compensation law, and makes the following response to J.R. Simplot Company's (hereafter "Simplot") Motion for Reconsideration, dated July 1, 2010.

Claimant states and alleges as follows:

1. Simplot's Motion to Reconsider acknowledges that the Claimant is totally and permanently disabled.

RESPONSE TO DEFENDANT J.R. SIMPLOT CO.'S MOTION TO RECONSIDER

Page *

83

FRED J. LEWIS ISB No. 3876
RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED
201 E. CENTER - CENTER STREET PLAZA
P. O. BOX 1391
POCATELLO, ID 83204-1391
Telephone: (208) 232-6101
Facsimile: (208) 232-6109

Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

DAVID TARBET,	)	I.C. Nos.	2007-038938 and
	)		2007-012004
)		
Claimant,)		
)		
v.)		
)		
J. R. SIMPLOT COMPANY,)		
)		
Employer/Surety)		
)		
STATE OF IDAHO, INDUSTRIAL)		
SPECIAL INDEMNITY FUND,)		
)		
Defendants.)		
_____)		

**CLAIMANT'S RESPONSE TO
DEFENDANT J.R. SIMPLOT CO.'S
MOTION FOR RECONSIDERATION**

COMES NOW the Claimant, DAVID TARBET, by and through his counsel of record, Fred J. Lewis, pursuant to Idaho Code § 72-718 and Rule 3(f) of the Judicial Rules of Practice and Procedure under the Idaho Workers Compensation law, and makes the following response to J.R. Simplot Company's (hereafter "Simplot") Motion for Reconsideration, dated July 1, 2010.

Claimant states and alleges as follows:

1. Simplot's Motion to Reconsider acknowledges that the Claimant is totally and permanently disabled.

2. Simplot urges the Commission to reconsider its finding of no liability as to the Industrial Special Indemnity Fund (hereafter "ISIF") under Idaho Code § 72-332.

3. Bill Jordan, a vocational expert for the ISIF, testified that the Claimant is totally and permanently disabled as a result of the Claimant's last accident of April 5, 2007.

4. It is anticipated that the ISIF will urge the Commission to uphold its decision finding the Claimant to be totally and permanently disabled as a result of the April 5, 2007 industrial accident.

5. It appears to the Claimant that neither Defendant will argue that the Claimant should not receive total and permanent disability benefits. Simplot will argue that the responsibility for the total and permanent disability benefits should be shared with the ISIF. The ISIF will argue that the Claimant's total and permanent disability benefits should be paid exclusively by Simplot.

6. Claimant in the enviable position where neither Defendant will argue that the Claimant should be denied total and permanent disability benefits. Therefore, Claimant leaves Simplot's Motion to Reconsider up to the good judgment of the Commission as to whether the ISIF should be liable for payment of the Claimant's total and permanent disability benefits under Idaho Code § 72-332.

7. Claimant respectfully submits that the Commission should uphold its decision finding the Claimant is totally and permanently disabled for the reasons set forth in the Commission Decision of June 14, 2010, and that the Claimant is thereby entitled to an award of total and permanent disability benefits under the Idaho Workers Compensation law.

WHEREFORE, the Claimant respectfully takes no position on Simplot's Motion to Reconsider and leaves the disposition of the Motion up to the good judgment of the Commission and urges the Commission to uphold that portion of its Decision finding that he is totally and permanently disabled under the "odd lot" doctrine, and awarding him total and permanent disability benefits under the Idaho Workers Compensation law.

DATED this 13TH Day of July, 2010.

RACINE, OLSON, NYE, BUDGE &
BAILEY, CHARTERED

By: 

FRED J. LEWIS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13 day of July, 2010, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

LAWRENCE E. KIRKENDALL
KIRKENDALL LAW OFFICES, CHTD
2995 North Cole Road, Ste 260
Boise, Idaho 83704

☒ U. S. Mail Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile

WES L. SCRIVNER
Attorney at Law
Post Office Box 27
Boise, Idaho 83707

☒ U. S. Mail
Postage Prepaid
☐ Hand Delivery
☐ Overnight Mail
☐ Facsimile


FRED J. LEWIS

Lawrence E. Kirkendall

Special Deputy Attorney General for the State of Idaho

KIRKENDALL LAW OFFICE, CHTD

2995 North Cole Road, Suite 260

Boise, ID 83704

Telephone: (208) 345-5262

Fax No: (208) 345-4859

ISB No. 3612

Attorney for Defendant, State of Idaho, Industrial Special Indemnity Fund

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID TARBET,

Claimant,

vs.

J. R. SIMPLOT COMPANY,

Employer/Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants.

IC Nos. 07-038938 and
07-012004

RESPONSE TO EMPLOYER'S MOTION
FOR RECONSIDERATION

FILED

JUL 21 2010

INDUSTRIAL COMMISSION

COMES NOW the Defendant, State of Idaho, Industrial Special Indemnity Fund, by and through its attorney of record, Lawrence E. Kirkendall, and does hereby respond to the Defendant/Self-Insured Employer's Motion for Reconsideration.

Lawrence E. Kirkendall
Special Deputy Attorney General for the State of Idaho
KIRKENDALL LAW OFFICE, CHTD
2995 North Cole Road, Suite 260
Boise, ID 83704
Telephone: (208) 345-5262
Fax No: (208) 345-4859
ISB No. 3612

Attorney for Defendant, State of Idaho, Industrial Special Indemnity Fund

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID TARBET,

Claimant,

vs.

J. R. SIMPLOT COMPANY,

Employer/Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants.

IC Nos. 07-038938 and
07-012004

RESPONSE TO EMPLOYER'S MOTION
FOR RECONSIDERATION

FILED
JUL 22 AM 11:22
CLERK OF DISTRICT COURT
IDAHO COUNTY

COMES NOW the Defendant, State of Idaho, Industrial Special
Indemnity Fund, by and through its attorney of record, Lawrence E.
Kirkendall, and does hereby respond to the Defendant/Self-Insured
Employer's Motion for Reconsideration.

INTRODUCTION

The Defendant/Self-Insured Employer Simplot (hereinafter 'Simplot') argues that the Referee's Finding of Fact, Conclusions of Law and Recommendation as approved by the Industrial Commission is not supported by substantial and competent evidence and therefore should not stand. Simplot asserts three arguments, which can be briefly summarized, as follows: First, Simplot argues that "implicit" in the referee's conclusions is an adoption of William Jordan's opinions, and that William Jordan is not credible and, therefore, it was error to rely on his opinions. Second, Simplot argues that Dr. Blair's August 17, 2009 letter, setting forth Dr. Blair's opinions in regards to the Claimant's limitations and restrictions, is rendered ambiguous by the use of the word "supersede", and should not be relied upon. Finally, Simplot argues that Dr. Collins' testimony is more credible and that it was error not to adopt her opinion. The Fund will briefly address each of these arguments raised by Simplot, although, for purposes of organization, in different order.

DR. BLAIR'S OPINION IS NOT AMBIGUOUS

Dr. Blair was the Claimant's surgeon and primary treating physician for his cervical surgeries following his last industrial accident, and provided the sole, exclusive and uncontested evidence of Claimant's limitations and restrictions acquired in his last industrial injury. On October 22, 2008, Dr. Blair authored a letter addressed to "To Whom it May Concern", wherein Dr. Blair stated as follows:

"Mr. David Tarbet is a patient of mine who is status post multi-level cervical fusion. He has significant work related restrictions of no lifting above his waist more than five pounds on a continuous basis and five pounds on an occasional basis. No repetitive squatting, crawling, kneeling, or stair/step/ladder climbing. Only occasional rotational sitting or rotational standing or bending forward. I believe these are permanent restrictions. By patient's relayed history, these restrictions preclude him from his pre-surgery employment." (Fund's Exhibit 14, Pg. 154)

Then, on November 19, 2008, Dr. Blair authored another letter to Simplot's adjuster wherein Dr. Blair provided the Claimant with a 28% whole person impairment rating, of which 100% was apportioned to the work related injury, and zero percent to the preexisting conditions. He goes on to state:

"Mr. Tarbet also has significant physical restrictions. In particular, no lifting above his waist more than five pounds on a continuous basis and ten pounds on an occasional basis. No repetitive squatting, crawling, kneeling, stair, step, or ladder climbing. Only occasional rotational positions with sitting, rotational standing, or bending forward. Again, these are permanent restrictions and I believe they are secondary to the work related injury." (Fund's Exhibit 14, Pg. 156)

On August 17, 2009, in a letter to Intermountain Claims, Dr. Blair authored his final opinion on the Claimant's limitations and restrictions. Unlike the other two letters, this letter was in follow-up to a telephone conversation between Dr. Blair and Simplot's adjuster:

"I am writing concerning my patient, David Tarbet, regarding our phone conversation today, August 17, 2009; particularly clarifying my 11/19/08 letter to Pinnacle Risk.¹

I believe Mr. Tarbet's restrictions of no repetitive squatting, crawling, kneeling, step ladder or ladder climbing or his restrictions of positional rotational sitting and forward bending, are due to his previous lumbar injury and not to his cervical injury of 4/5/07. I do believe, however, his restrictions of lifting no more than five pounds on a continuous basis and ten pounds on an occasional basis are due to his cervical injury. Certainly, there were preexisting lifting limitations due to the lumbar spine, however, I believe these current restrictions supersede his previous lumbar restrictions, as far a lifting is concerned, due to the fact that

¹ The 8/17/09 letter was written to Intermountain Claims, who apparently took over adjusting Simplot claims from Pinnacle Risk.

they are more restrictive.” (Fund’s Exhibit 14, Pg. 157)
(Emphasis added)

In context, it is certainly clear that the five pound lifting limitations are due solely to his cervical injury. Obviously, the reason that the restrictions “supersede” his lumbar restrictions are, as is explained by Dr. Blair, “due to the fact that they are more restrictive”. Simplot’s argument that these limitations and restrictions are ambiguous is clearly without merit and, therefore, the Referee’s reliance on the limitations and restrictions provided by Dr. Blair is not an error.

Removing the alleged ambiguity in Dr. Blair’s assignment of limitations and restrictions of five pounds lifting repetitively and ten pounds lifting occasionally is pivotal in assessing any vocational expert’s opinions and, therefore, the remainder of Simplot’s arguments; for it is the Referee’s finding that the five pound lifting limitation and Claimant’s non-medical factors are, alone, sufficient to combine in Claimant’s total and permanent disability.

The record is replete with unique non-medical factors that combine with the five pound lift restriction. These factors include the current poor

economy, the isolated Soda Springs labor market, the Claimant's age, Claimant's education, and lack of transferable skills.

The following facts gleaned from testimony are exemplary, and not exhaustive, of the impacting non-medical factors.

NON-MEDICAL FACTORS

Only two thousand, three hundred people live in Soda Springs. (T. Pg. 67, L 24) The Claimant testified that basically, there are three big employers, all involved with mining: Monsanto, Agrium, and Simplot. (T. Pg. 68, L 1) Most of those employers have had the same employees for "many, many years", and there were no openings until someone "quit or died". (T. Pg. 67, L 17-20) Following the three large employers, the second tier of employers would include those businesses which contract with the mines. Next, would be State, County and City jobs, followed by service jobs. (T. Pg. 68, beginning with L 1)

The Claimant began putting out applications in October of 2008, and continued to search for a job for fourteen months. However, not one single place where he put in an application was actually posting an open

position. (T. Pg. 94, L 5-7) Despite this extensive search, not surprisingly, he had no follow-up calls or job offers. (T. Pg. 66, L 18 to Pg. 69, L 17)

The Claimant testified that most places are not hiring because of the economy. (T. Pg. 67, L 17) The Claimant identified businesses in Soda Springs which are struggling simply to keep core men busy. (T. Pg 69, L 8-13) Soda Springs has experienced no growth, and in fact, places have begun shutting down. (T. Pg. 95, L 2) The Claimant has noticed "a bunch" of men at the café, who are being laid off or "with just no employment". (T. Pg. 111, L 1-8) He has two friends at the café now who worked the same job for ten years that just got laid off. (T. Pg. 120, L 20-23)

Many places would not accept his application. (T. Pg. 66, L. 24) Many places only had family jobs available. (T. Pg. 66, L 24 to Pg. 67, L 3) Most places would hire only seasonally, but are not currently hiring. (T. Pg. 67, L 3) Most of the businesses in Soda Springs have had the same employees for many, many years, and no openings appear at jobs until somebody quits or dies. (T. Pg. 67, L 17-20)

The unemployment rate in Caribou County has held steady at 5.3%. (Depo. of Collins, Pg. 40, L 20) However, in Soda Springs, nobody is

building new projects, construction is down, there is less hiring of new employees, and there are more employees competing for fewer jobs. (Depo. of Collins, Pg. 41)

Moreover, age is also a large disability factor. At time of hearing, the Claimant was 62 years old. (T. Pg. 23, L 5) Without consideration for his physical impairments whatsoever, his age, alone, limits the Claimant to unskilled, low level, semi-skilled work that he could learn within 30 days. (Depo. of Collins, Pg. 45, L 20 to Pg. 45, L 2) And, most employers are not willing to train older employees. (Depo. of Collins, Pg. 44)

Claimant's education and lack of transferable skills are a disability factor. Claimant's last grade finished was tenth grade, last attended is eleventh grade. (T. Pg. 24, L 13) The Claimant eventually obtained a GED. (Depo. of Collins, Pg. 29, L 18) The Claimant has no computer skills and is computer illiterate. (Depo. of Collins, Pg. 30, L 17) The Claimant started work at Simplot in 1971 and worked up until the time of the injury. (T. Pg. 25, L 15) Therefore, the Claimant has had no sales skills, and has no customer service skills. (Depo. of Collins, Pg. 31, L 2-5) The Claimant prefers to work alone. (T. Pg. 101, L 5)

Clearly, the Claimant's disability impacted by the non-medical factors, alone, were great.

DR. COLLINS v. JORDAN

Given the Referee's Findings of Fact, both experts' opinions should be analyzed in light of the five pound lifting restriction and non-medical factors above. The issue at hand should focus on whether or not real, actual jobs existed in the Soda Springs labor market which the Claimant could have otherwise performed but for his preexisting conditions, and not, as argued by Simplot, whether William Jordan's opinions on the Claimant's preexisting impairments is tainted by advocacy, and therefore not reliable.

In regards to this real issue, it was Dr. Collins' opinion that the Claimant had access to light sedentary work, and that there were jobs that he could otherwise do in the light to sedentary category with the five pound lifting restriction but for his preexisting physical impairments. Dr. Collins provided various examples of generic jobs that Claimant would have been able to otherwise do. (Employer's Memorandum, Pg. 12)

However, Dr. Collins' generic job descriptions beg the question: Where are those jobs in Soda Springs?

To state the obvious, whether Tarbet could return to employment in Soda Springs or not with a five pound lift limitation, coupled only with his non-medical factors, is totally dependent upon which actual jobs are available to him in that labor market. Collins, in her report, and in her testimony, has failed to identify any real job available in Soda Springs to which Tarbet could have returned "but for" his preexisting impairments. This paucity of available employment opportunities is underscored by Simplot's heavy reliance of Dr. Collins' testimony identifying only one single "actual" job that was within Claimants cervical restrictions that he would have been able to do but for his preexisting physical impairments. The decision adequately addresses this alleged specific job in Finding 22 (D), wherein the Referee concluded: "Therefore, this evidence is insufficient to establish that the position in question was a realistic employment opportunity for the Claimant". (Findings of Fact, Pg. 15)

This finding, by the Referee, is supported by Dr. Collins' own testimony: (at the relevant portion)

A: (by Dr. Collins) "There was a job yesterday that I found over in that area that was for a company - it was actually in Soda Springs. It was for a company that helps set up new stores, or displays for stores. And it was the one that required lifting five to ten pounds. But is also required the employee to be able to frequently stand, walk, stoop, bend, crouch, balance, use fingers, hands. So it was really not available to him. And that appeared to be certainly a combination issue. You would have to be diligent in your job search.

Q: (by Mr. Kirkendall) Do you know how many people would apply for those jobs in Caribou County?

A: I don't."

(Depo. of Dr Collins, Pg. 54, Line 5 - 19)

Q: (by Mr. Kirkendall) This sedentary job, setting up stores with the five to ten pound lifting restriction, is that a full time job?

A: I don't know what it said. It doesn't say whether it is full time or not.

Q: So we don't know if it was something that could have ran for a few weeks, and then been over, or something that would have ran year-round?

A: We don't.

Q: You don't know if it involved travel?

A: Had to have a valid driver's license, and proof of auto insurance, but it didn't say.

Q: Is that a true representation of jobs that would have been regularly and continuously available in Soda Springs?

A: This particular job?

Q: Yes.

A: Probably not regularly available, no."

(Depo. of Dr. Collins, Pg. 68, L 13 through Pg. 69, L 6)

In contrast, William Jordan identified numerous jobs in the actual Soda Springs labor market which were unavailable to Mr. Tarbet based on his cervical limitations and restrictions and non-medical factors alone. (Fund's Exhibit 28, Pg. 740)

Given the foregoing, it is respectfully requested that Simplot's Motion for Reconsideration be denied.

DATED this 21st day of July, 2010.

KIRKENDALL LAW OFFICES, CHTD.

A handwritten signature in black ink, appearing to read 'L. E. Kirkendall', is written over a horizontal line.

Lawrence E. Kirkendall
*Attorney for Defendant,
State of Idaho, Industrial Special
Indemnity Fund*

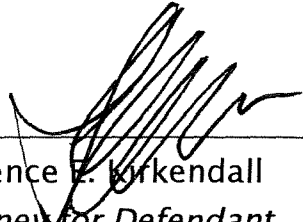
CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that on this 21st day of July, 2010, I caused a true and correct copy of the foregoing instrument to be delivered to the following in the manner indicated below:

Fred J. Lewis	(X) First Class Mail, postage prepaid
Racine, Olson, Nye, Budge & Bailey	() Hand Delivery
201 East Center - Center Street Plaza	() Overnight Mail
P.O. Box 1391	(X) Facsimile to (208) 232-6109
Pocatello, ID 83204	
<i>Attorney for Claimant</i>	

Wes Scrivner	(X) First Class Mail, postage prepaid
J.R. Simplot Legal Department	() Hand Delivery
999 Main Street, 13 th Floor	() Overnight Mail
P.O. Box 27	(X) Facsimile to 389-7464
Boise, ID 83707	
<i>Attorney for Employer/Surety</i>	

KIRKENDALL LAW OFFICES, CHTD.



Lawrence E. Kirkendall
*Attorney for Defendant,
State of Idaho, Industrial Special
Indemnity Fund*

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID TARBET,)
)
 Claimant,)
)
 v.)
)
 J.R. SIMPLOT COMPANY,)
)
 Self-Insured Employer,)
 and)
)
 STATE OF IDAHO, INDUSTRIAL)
 SPECIAL INDEMNITY FUND,)
)
 Defendants.)
)
 _____)

IC 2007-012004
2007-038938

ORDER DENYING
RECONSIDERATION

FILED

AUG 18 2010

INDUSTRIAL COMMISSION

Employer filed a motion for reconsideration on July 1, 2010. Claimant filed his response to the motion for reconsideration on July 14, 2010. The Industrial Special Indemnity Fund (ISIF) filed a response opposing the motion for reconsideration on July 21, 2010. In the underlying case, the Commission found that Claimant had proven that he is totally and permanently disabled, and that the ISIF is not liable for Claimant's benefits and the Complaint against the ISIF should be dismissed with prejudice.

Employer argues that the Commission's finding that the ISIF has no liability to Claimant is not supported by substantial and competent evidence as required by the law. Further, Employer argues that the Commission did not set forth its reasoning for determining that Claimant is totally and permanently disabled based solely on his five pound lifting restrictions, in contravention of the *Ellison v. Bunker Hill Company*, 96 Idaho 317, 528 P.2d 1999 (1974) and *Nenoff v. Culligan Soft Water*, 95 Idaho 834, 521 P.2d 658 (1974) decisions. Employer also contends that Mr. William Jordan's and Dr. Blair's testimony was flawed. Employer

argues that the Commission should have relied on Dr. Nancy Collins' opinion. Employer argues that Claimant had significant restrictions following his 2001 injury, and that "Claimant was allowed to work at Simplot despite injuries and limitations that would have prevented him from doing so in the absence of his near-heroic efforts and Simplot's stalwart encouragement and assistance." Employer's Br., p. 11. Employer argues that that Commission is unfairly burdening Employer in this matter, given that the ISIF was created to encourage employers to hire employees with disabilities. Employer requests that the Commission enter an order reconsidering its decision, and reversing the finding that the ISIF is not liable for any portion of Claimant's benefits.

ISIF argues that the Commission correctly determined that Claimant was totally and permanently disabled due to his last accident. ISIF contends that Dr. Blair's testimony is not ambiguous in context of the case, and that it was appropriate to adopt Mr. Jordan's testimony over Dr. Collins' testimony. ISIF counters that Dr. Collins' testimony had weaknesses, particularly Dr. Collins' testimony about the availability of jobs in the relevant labor market. ISIF argues that this case had significant non-medical factors, including Claimant's age, education, lack of transferable skills, the current economic downturn, and the labor market, which influenced the case's outcome. ISIF requests that the Commission uphold the finding that the ISIF is not liable for Claimant's benefits, because Claimant's nonmedical factors, combined with his 5-pound lifting restriction from his last industrial accident, render him totally and permanently disabled.

Claimant fully supports the Commission's determination that he is totally and permanently disabled. However, Claimant will defer to the Commission's judgment as to whether and Employer and ISIF should share liability for his last industrial accident.

Under Idaho Code § 72-718, a decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision. In any such event, the decision shall be final upon denial of a motion for rehearing or reconsideration, or the filing of the decision on rehearing or reconsideration. J.R.P. 3(f) states that a motion to reconsider "shall be supported by a brief filed with the motion." Generally, greater leniency is afforded to *pro se* claimants. However, "it is axiomatic that a claimant must present to the Commission new reasons factually and legally to support a hearing on her Motion for Rehearing/Reconsideration rather than rehashing evidence previously presented." *Curtis v. M.H. King Co.*, 142 Idaho 383, 388, 128 P.3d 920 (2005). On reconsideration, the Commission will examine the evidence in the case, and determine whether the evidence presented supports the legal conclusions. The Commission is not compelled to make findings on the facts of the case during a reconsideration. *Davison v. H.H. Keim Co., Ltd.*, 110 Idaho 758, 718 P.2d 1196. The Commission may reverse its decision upon a motion for reconsideration, or rehearing of the decision in question, based on the arguments presented, or upon its own motion provided that it acts within the time frame established in Idaho Code § 72-718. *See, Dennis v. School District No. 91*, 135 Idaho 94, 15 P.3d 329 (2000) (*citing Kindred v. Amalgamated Sugar Co.*, 114 Idaho 284, 756 P.2d 410 (1988)).

The Idaho Supreme Court has recognized that the ISIF was created for two purposes, "to encourage the hiring of the handicapped and, as a corollary, to relieve employers of the unfair burden of paying total permanent disability compensation when only part of the disability was due to the industrial accident." *See, Gugelman v Pressure Treated Timber Co.*, 102 Idaho 356 at 360, 630 P.2d 148 at 152 (1981). However, it is noted that the ISIF shares the burden of paying

total disability compensation *when only part of the disability* was due to the industrial accident. A claimant must meet the four requirements under Idaho Code § 72-332 to show ISIF liability, as explained in *Dumaw v. J.L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990). These requirements for ISIF liability include:

1. Whether there was indeed a preexisting impairment;
2. Whether that impairment was manifest;
3. Whether the alleged impairment was a subjective hindrance; and
4. Whether the alleged impairment in any way combines in causing total disability.

Dumaw, 118 Idaho at 155, 795 P.2d at 317.

In this case, the Commission was persuaded that Claimant was totally and permanently disabled due to the restrictions and non-medical factors connected with his *last industrial accident alone*. As mentioned in the Commission's decision, there is no "combination" if the disability would have been total regardless of preexisting conditions. *Selzler v. State of Idaho, Industrial Special Indemnity Fund*, 124 Idaho 144, 857 P.2d 623 (1993).

In support of its motion for reconsideration, Employer argues that the evidence of record clearly establishes that Claimant's pre-existing impairment constituted a subjective hindrance to Claimant prior to the subject accident, and that it is only by virtue of the combined effects of the pre-existing impairment and the work accident that Claimant is rendered totally and permanently disabled. The Commission agrees that Claimant's pre-existing impairments did hinder him in his ability to engage in gainful activity prior to the work accident. However, the claim against the ISIF nevertheless fails since the Commission is persuaded that the injuries resulting from the subject accident, standing alone, are sufficient to cause permanent and total disability. In short, the "combining with" component of the test is not satisfied.

Claimant's limitations from the last industrial accident include a 5-pound lifting restriction and hoarseness from his damaged vocal cords. Employer's expert, Dr. Collins, argues that Claimant might be able to perform in a customer service position with his industrial accident impairments, if it were not for his pre-existing hearing loss. Thus, Employer argues that the "combining" element is satisfied because it was Claimant's pre-existing hearing loss plus Claimant's cervical lifting restriction that made customer service jobs unavailable to him. The ISIF argued that Claimant's relevant non-medical factors, including Claimant's temperament, sophistication, geographic locale, native intelligence, combined with his 5-pound lifting restriction, and hoarseness preclude the positions Dr. Collins suggested from being truly available to Claimant. Further, if Claimant is unable to talk after a while, due to his vocal hoarseness, the Commission is not persuaded that the customer service position was really an acceptable position for Claimant, regardless of his pre-existing hearing impairment.

The Commission has previously considered the relative merits of the opposing expert testimony in this case. Inconsistencies in testimony may affect the credibility of an expert, but witnesses and experts are not expected to be infallible in order to present credible testimony before the Commission. Viewed as a whole, it is clear from Dr. Blair's and Mr. Jordan's testimony that Claimant's was totally and permanently disabled due to the restrictions identified in his last industrial accident. It is understandable that Employer finds the testimony of their own witness more credible than that of the opposing side. However, Dr. Collins' testimony was not without weaknesses, particularly with respect to identifying positions realistically available to Claimant in the Soda Springs area.

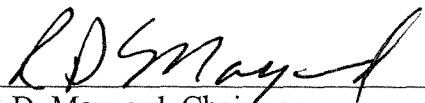
Quite apart from the issue of the significance of Claimant's pre-existing limitations/restrictions, the evidence persuades the Commission that the subject accident alone is sufficient to render Claimant totally and permanently disabled.

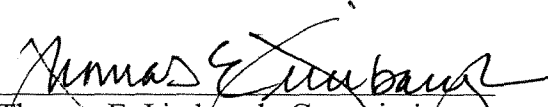
For the foregoing reasons, Employer's Motion for Reconsideration should be, and is hereby, **DENIED**.


IT IS SO ORDERED.

DATED this 18th day of August, 2010.


INDUSTRIAL COMMISSION



R.D. Maynard, Chairman


Thomas E. Limbaugh, Commissioner


Thomas P. Baskin, Commissioner

ATTEST:


Assistant Commission Secretary



The seal is circular with a dotted border. Inside the border, the words "INDUSTRIAL COMMISSION" are written in a circle at the top, and "OF IDAHO" is at the bottom. A five-pointed star is positioned at the bottom center of the seal.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of August 2010, a true and correct copy of the foregoing **ORDER DENYING RECONSIDERATION** was served by regular United States Mail upon each of the following:

FRED J LEWIS
PO BOX 1391
POCATELLO ID 83204-1391

WES L SCRIVNER
PO BOX 27
BOISE ID 83707-0027

LAWRENCE E KIRKENDALL
2995 N COLE RD STE 260
BOISE ID 83706

cs-m/cjh

Carol J Haight

WES L. SCRIVNER
J.R. SIMPLOT CO.
Attorney at Law
P.O. Box 27
Boise, Idaho 83707-0027
Telephone: 208-389-7314
Facsimile: 208-389-7464
ISB 2306

2010 SEP -81 P 3:56
RECEIVED
INDUSTRIAL COMMISSION

Attorney for Self-Insured Employer

DANIEL A. MILLER
LUDWIG ♦ SHOUFLER ♦ MILLER ♦ JOHNSON, LLP
Attorneys at Law
401 West Front Street, Suite 401
Boise, ID 83702
Telephone: 208-387-0400
Facsimile: 208-387-1999
ISB 3571

Attorney for Self-Insured Employer

BEFORE THE INDUSTRIAL COMMISSION

FOR THE STATE OF IDAHO

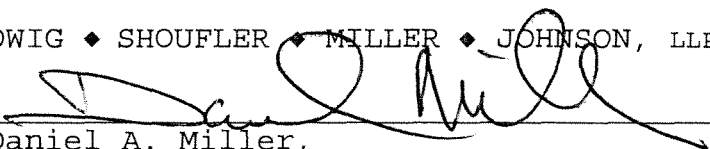
DAVID TARBET,)	
)	
Claimant,	)	CASE NO. IC-2007-012004
	)	IC-2007-038938
vs.)	
)	
JR SIMPLOT COMPANY,)	
	)	ASSOCIATION OF COUNSEL
Self-Insured,)	
Employer/Defendant,)	
)	
and)	
)	
STATE OF IDAHO, INDUSTRIAL)	
SPECIAL INDEMNITY FUND,)	
)	
Defendants.)	
)	

ASSOCIATION OF COUNSEL - 1

Self-Insured Employer/Defendant gives notice that Daniel A. Miller of Ludwig Shoufler Miller Johnson, LLP will be appearing as associate counsel for Self-Insured Employer/Defendant.

DATED This _____ day of September, 2010.

LUDWIG ♦ SHOUFLER ♦ MILLER ♦ JOHNSON, LLP

By 
Daniel A. Miller,
Attorneys for Self-Insured Employer/
Defendant

J.R. SIMPLOT COMPANY

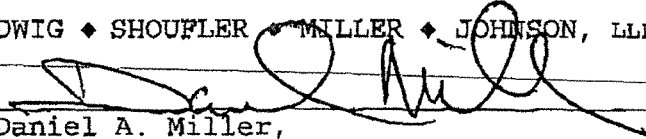
By _____
Wes L. Scrivner,
Attorneys for Self-Insured Employer/
Defendant

Self-Insured Employer/Defendant gives notice that Daniel A. Miller of Ludwig Shoufler Miller Johnson, LLP will be appearing as associate counsel for Self-Insured Employer/Defendant.

DATED This 3rd day of September, 2010.

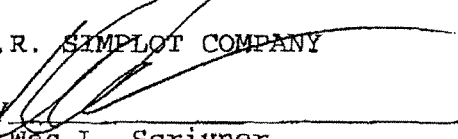
LUDWIG ♦ SHOUFLE ♦ MILLER ♦ JOHNSON, LLP

By


Daniel A. Miller,
Attorneys for Self-Insured Employer/
Defendant

J.R. SIMPLOT COMPANY

By


Wes L. Scrivner,
Attorneys for Self-Insured Employer/
Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 8 day of September, 2010, I caused a true and correct copy of the foregoing document to be served upon the following as indicated:

WES L. SCRIVNER
J.R. SIMPLOT CO.
Attorney at Law
P.O. Box 27
Boise, Idaho 83707-0027

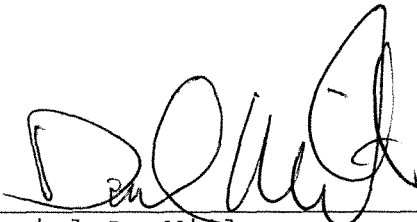
☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile Transmission
(208) 389-7464

Lawrence E. Kirkendall
KIRKENDALL LAW
Attorney at Law
2995 North Cole Road
Suite 260
Boise, Idaho 83704

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile Transmission
(208) 345-4859

Fred J. Lewis
Racine Olson Nye Budge
& Bailey, Chtd.
Attorney at Law
P.O. Box 1391
Pocatello, Idaho 83204-1391

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile Transmission
(208) 232-6109



Daniel A. Miller

WES L. SCRIVNER
J.R. SIMPLOT CO.
Attorney at Law
P.O. Box 27
Boise, Idaho 83707-0027
Telephone: 208-389-7314
Facsimile: 208-389-7464
ISB 2306

Attorney for Self-Insured Employer/Appellant

DANIEL A. MILLER
LUDWIG ♦ SHOUFLER ♦ MILLER ♦ JOHNSON, LLP
Attorneys at Law
401 West Front Street, Suite 401
Boise, ID 83702
Telephone: 208-387-0400
Facsimile: 208-387-1999
ISB 3571

Attorney for Self-Insured Employer/Appellant

2010 SEP 24, P 12:22
RECEIVED
INDUSTRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION FOR THE STATE OF IDAHO

DAVID TARBET,)
)
Claimant/Respondent,)
)
vs.)
)
JR SIMPLOT COMPANY,)
)
Self-Insured,)
Employer/Defendant/Appellant,)
)
and)
)
STATE OF IDAHO, INDUSTRIAL)
SPECIAL INDEMNITY FUND,)
)
Defendants.)
)
_____)

CASE NO. IC-2007-012004
IC-2007-038938 -

NOTICE OF APPEAL

NOTICE OF APPEAL - 1

TO: THE ABOVE-NAMED RESPONDENTS, DAVID TARBET, AND HIS ATTORNEY, THE STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, AND ITS ATTORNEY, AND THE SECRETARY OF THE ABOVE-ENTITLED ADMINISTRATIVE AGENCY, NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant, J.R. SIMPLOT COMPANY, appeals against the above-named Respondents, DAVID TARBET and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, to the Idaho Supreme Court from the Idaho Industrial Commission Order and Findings of Fact, and Conclusions of Law entered June 14, 2010, Commissioner Presiding, R.D. Maynard and the Order Denying Appellant's Motion to Reconsider entered August 18, 2010.

2. The issues presented on appeal include:

a. Is the Commission's finding that Claimant's last industrial accident is the sole cause of his total permanent disability supported by substantial and competent evidence?

3. Appellant has a right to appeal to the Idaho Supreme Court, and the Judgment or Orders described in Paragraph 1 above are appealable orders under and pursuant to I.A.R., Rule 11(d).

4. A reporter's transcript of the Hearing held on December 10, 2009, is requested and said transcript may be in compressed format.

5. The Appellant requests the following documents to be included in the agency's record in addition to those automatically included under Rule 28, I.A.R.:

a. Transcript of Hearing held on December 10, 2009;

b. Deposition transcripts of both of Claimant's depositions taken on January 25, 2008 and October 7,

2009 (admitted into evidence at the hearing as Employer's exhibits 19 and 20); the post hearing deposition transcript of William Jordan taken on January 5, 2010; the post hearing deposition transcript of Nancy Collins taken on January 5, 2010; and the post hearing deposition transcript of Dr. Gary Walker taken on January 7, 2010;

- c. Transcript of the parties' closing arguments held on February 5, 2010; and
- d. All exhibits admitted into evidence during the Hearing.

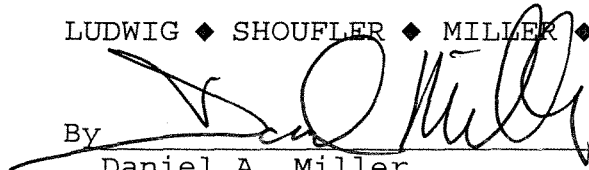
6. I certify:

- a. A copy of this Notice of Appeal has been served on the reporter of the proceeding.
- b. That the administrative agency has not been paid a fee for the reporter's transcript because there is no fee charged for preparation of the transcript of the hearing.
- c. That the estimated fee for preparation of the clerk's record has been paid.
- d. That the appellate filing fee has been paid.
- e. That service has been made upon all parties required to be served pursuant to I.A.R., Rule 20.

DATED this 24 day of September, 2010.

LUDWIG ♦ SHOUFLE ♦ MILLER ♦ JOHNSON, LLP

By


Daniel A. Miller,
Attorney for Self-Insured Employer/
Defendant/Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 24 day of September, 2010, I caused a true and correct copy of the foregoing document to be served upon the following as indicated:

WES L. SCRIVNER
J.R. SIMPLOT CO.
Attorney at Law
P.O. Box 27
Boise, Idaho 83707-0027

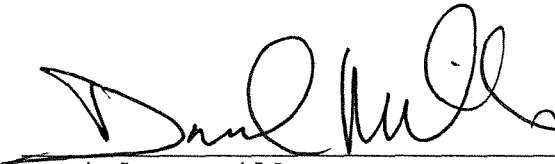
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(208) 389-7464

Lawrence E. Kirkendall
KIRKENDALL LAW
Attorney at Law
2995 North Cole Road
Suite 260
Boise, Idaho 83704

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile Transmission
(208) 345-4859

Fred J. Lewis
Racine Olson Nye Budge
& Bailey, Chtd.
Attorney at Law
P.O. Box 1391
Pocatello, Idaho 83204-1391

☒ U.S. Mail
☐ Hand Delivery
☐ Overnight Courier
☐ Facsimile Transmission
(208) 232-6109



Daniel A. Miller

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

DAVID TARBET,

Claimant/Respondent,

v.

J. R. SIMPLOT, Self-Insured Employer,

Defendant/Appellant.

and

STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND,

Defendant/Respondent.

SUPREME COURT NO. 38096

CERTIFICATE OF APPEAL

RECEIVED
IDAHO SUPREME COURT
COURT OF APPEALS
2010 OCT - 8 A 4 50

Appeal From:

Industrial Commission, Chairman, R.D. Maynard,
presiding.

Case Number:

IC 2007-012004 and 2007-038938

Order Appealed from:

Findings of Fact, Conclusions of Law, and
Recommendation, filed June 14, 2010; and Order,
filed June 14, 2010, and Order Denying
Reconsideration, filed August 18, 2010.

Attorney for Defendant/Appellant:

Wes L. Scrivner
PO Box 27
Boise, ID 83707

Associate of Counsel for
Defendant/Appellant:

Daniel A. Miller
401 W. Front St. Ste. 401
Boise, ID 83702

Attorney for Claimant/Respondent:

Fred J. Lewis
PO Box 1391
Pocatello, ID 83204-1391

CERTIFICATE OF APPEAL - TARBET - 1

FILED - ORIGINAL
OCT - 8 2010
Supreme Court _____ Court of Appeals _____ Entered on ATS by _____

Attorney for Defendant/Respondent:

Lawrence E. Kirkendall
2995 N. Cole Rd. Ste 260
Boise, ID 83706

Appealed By:

J.R. Simplot Company

Appealed Against:

David Tarbet and Industrial Special Indemnity Fund

Notice of Appeal Filed:

September 24, 2010

Appellate Fee Paid:

\$86.00

Name of Reporter:

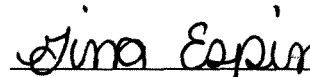
Paul Buchanan, M & M Court Reporting

Transcript Requested:

Standard transcript has been requested. Transcript has been prepared and filed with the Commission.

Dated

October 6, 2010


Assistant Commission Secretary




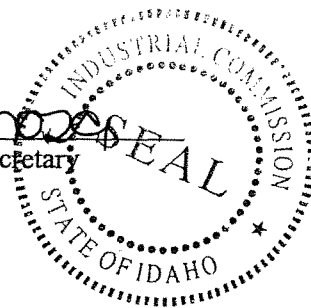
CERTIFICATE OF APPEAL - TARBET - 2

CERTIFICATION

I, Gina Espinosa, the undersigned Assistant Commission Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the Notice of Appeal, Findings of Fact, Conclusions of Law, and Recommendation, and Order, and Order Denying Reconsideration, and the whole thereof, in IC case number 2007-012004 and 2007-038938 for David Tarbet.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 6th day of October, 2010.


Assistant Commission Secretary



ORIGINAL

Lawrence E. Kirkendall

KIRKENDALL LAW OFFICE, CHTD.

2995 North Cole Road, Suite 260 2010 OCT -5 A 8:42

Boise, ID 83704

Telephone: (208) 345-5262

RECEIVED
INDUSTRIAL COMMISSION

Fax No: (208) 345-4859

ISB No. 3612

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DAVID TARBET,

Claimant,

vs.

J. R. SIMPLOT COMPANY,

Employer/Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants.

IC Nos. 07-038938 and
07-012004

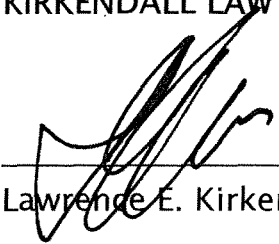
SUBSTITUTION OF COUNSEL FOR
DEFENDANT, STATE OF IDAHO,
INDUSTRIAL SPECIAL INDEMNITY FUND

Pursuant to I.R.C.P Rule 11(b)(1), PLEASE TAKE NOTICE that Paul J. Augustine of the firm Augustine Law Offices, P.L.L.C., P.O. Box 1521, 1004 West Fort Street, Boise, Idaho 83701, is hereby substituted as attorney for the above named Defendant, State of Idaho, Industrial Special Indemnity Fund, in the above-entitled action in place of Lawrence E. SUBSTITUTION OF COUNSEL FOR DEFENDANTS, STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Page 1

Kirkendall, of Kirkendall Law Office, CHTD., 2995 North Cole Road, Suite, 260, Boise, ID 83704, who hereby withdraws as said Defendant's attorney.

DATED this 30th day of September, 2010.

KIRKENDALL LAW OFFICE, CHTD



Lawrence E. Kirkendall

AUGUSTINE LAW OFFICES, P.L.L.C.



Paul J. Augustine

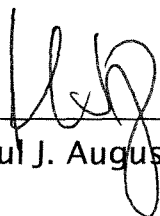
CERTIFICATE OF DELIVERY

I HEREBY CERTIFY that on this 9th day of ^{After}~~September~~, 2010, I caused a true and correct copy of the foregoing instrument to be delivered to the following in the manner indicated below:

Fred J. Lewis	(X) First Class Mail, postage prepaid
Racine, Olson, Nye, Budge & Bailey	() Hand Delivery
201 East Center - Center Street Plaza	() Overnight Mail
P.O. Box 1391	(X) Facsimile to (208) 232-6109
Pocatello, ID 83204	
<i>Attorney for Claimant</i>	

Wes Scrivner	(X) First Class Mail, postage prepaid
J.R. Simplot Legal Department	() Hand Delivery
999 Main Street, 13 th Floor	() Overnight Mail
P.O. Box 27	(X) Facsimile to 389-7464
Boise, ID 83707	
<i>Attorney for Employer/Surety</i>	

AUGUSTINE LAW OFFICES, P.L.L.C.



Paul J. Augustine

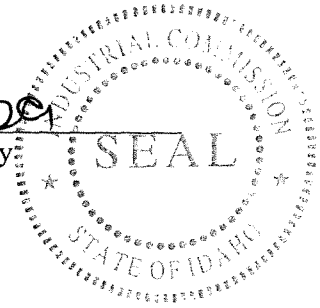
CERTIFICATION OF RECORD

I, Gina Espinosa, the undersigned Assistant Commission Secretary of the Industrial Commission, do hereby certify that the foregoing record contains true and correct copies of all pleadings, documents, and papers designated to be included in the Agency's Record Supreme Court No. 38096 on appeal by Rule 28(3) of the Idaho Appellate Rules and by the Notice of Appeal, pursuant to the provisions of Rule 28(b).

I further certify that all exhibits offered or admitted in this proceeding, if any, are correctly listed in the Certificate of Exhibits (i). Said exhibits will be lodged with the Supreme Court upon settlement of the Reporter's Transcript and Record herein.

DATED this 27th day of October, 2010.


Assistant Commission Secretary



BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

DAVID TARBET,)	
)	
Claimant/Respondent,)	
	)	SUPREME COURT NO. 38096
v.)	
)	
J. R. SIMPLOT, Self-Insured Employer,	)	NOTICE OF COMPLETION
)	
Defendant/Appellant.)	
)	
and)	
)	
STATE OF IDAHO, INDUSTRIAL)	
SPECIAL INDEMNITY FUND,)	
)	
Defendant/Respondent.)	
_____)	

TO: STEPHEN W. KENYON, Clerk of the Courts; and
Daniel A. Miller and Wes L. Scrivner for the Appellant;
Fred J. Lewis for Claimant/Respondent; and
Paul J. Augustine for ISIF/Respondent.

YOU ARE HEREBY NOTIFIED that the Agency's Record was completed on this date and,
pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been served
by regular U.S. mail upon each of the following:

Attorney for Defendant/Appellant:	Daniel A. Miller 401 W. Front St. Ste. 401 Boise, ID 83702
Attorney for Claimant/Respondent:	Fred J. Lewis PO Box 1391 Pocatello, ID 83204-1391
Attorney for ISIF:	Paul J. Augustine PO Box 1521 Boise, ID 83701

YOU ARE FURTHER NOTIFIED that pursuant to Rule 29(a), Idaho Appellate Rules, all parties have twenty-eight days from this date in which to file objections to the Record, including requests for corrections, additions or deletions. In the event no objections to the Agency's Record are filed within the twenty-eight day period, the Transcript and Record shall be deemed settled.

DATED this 27th day of October, 2010.

Lina Espinoza
Assistant Commission Secretary

